Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 157.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

EMMA S. FAYERWEATHER AND MARY W. ACHTER,
Appellants,

vs.

THOMAS G. RITCH ET AL., INDIVIDUALLY, AND AS EXECUTORS, &C., AND OTHERS.

No. 158.

JOHN B. REYNOLDS, AS SOLE EXECUTOR OF THE LAST WIL. AND CODICIL OF LUCY FAYERWEATHER, DECEASED,
Appellant,

vs.

THOMAS G. RITCH ET AL., INDIVIDUALLY, AND AS EXECUTORS, &C., AND OTHERS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES, ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY, THE TRUSTEES OF AMHERST COLLEGE, LAFAYETTE COLLEGE, THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, THE TRUSTEES OF COLUMBIA COLLEGE IN THE CITY OF NEW YORK, CORNELL UNIVERSITY, THE TRUSTEES OF DARTMOUTH COLLEGE, HAMILTON COLLEGE, MARIETTA COLLEGE, NORTHWESTERN UNIVERSITY, UNIVERSITY OF ROCHESTER, UNION THEOLOGICAL SEMINARY, WESLEYAN UNIVERSITY, THE PRESIDENT AND TRUSTEES OF WILLIAMS COLLEGE, THE PRESIDENT AND FELLOWS OF YALE COLLEGE.

ELIHU ROOT,
JAMES L. BISHOP,
Counsel.

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EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
vs.
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 157.

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,
vs.
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 158.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for appellees, Adelbert College of the Western Reserve University, The Trustees of Amherst College, Lafayette College, The President and Trustees of Bowdoin College, The Trustees of Columbia College in the City of New York, Cornell University, The Trustees of Dartmouth College, Hamilton College, Marietta College, Northwestern University, University

of Rochester, Union Theological Seminary, Wesleyan University, The President and Trustees of Williams College, The President and Fellows of Yale College.

These are appeals by the complainants and the cross complainant from a decree of the Circuit Court of the United States for the Southern District of New York dismissing the bill and cross-bill.

The suits came on for final hearing upon pleas and supporting answers filed by the following defendants, among others: Adelbert College of the Western Reserve University, The Trustees of Amherst College, The President and Trustees of Bowdoin College, The Trustees of Columbia College of the City of New York, Cornell University, Trustees of Dartmouth College, Hamilton College, Lafayette College, Marietta College, Northwestern University, University of Rochester, Union Thelogical Seminary, Wesleyan University, The President and Trustees of Williams College and The President and Fellows of Yale College.

Pleas to the amended bill of complaint, substantially the same as the plea of Hamilton College (Record, Vol. 1, pp. 176–187), were filed or are deemed to have been filed by Northwestern University, The University of Rochester, The Trustees of Amherst College, The President and Trustees of Williams College, The Union Theological Seminary, Lafayette College, The Trustees of Columbia College and Adelbert College (Record, Vol. 1, p. 190).

Pleas similar to the plea filed by Marietta College (Record, Vol. 1, pp. 191–205) were filed or are deemed to have been filed by Wesleyan University, Cornell University, Yale College, Dartmouth College and Bowdoin College (Record, fol. 1, p. 206).

Each of these pleas sets up by way of bar to the cause of action stated in the amended bill of complaint a judgment recovered in the Supreme Court of the State of New York in an action brought by

the Trustees of Amherst College, Trustees of Dartmouth College, Trustees of Hamilton College, University of Rochester and the President and Trustees of Williams College against the complainants and all the defendants, except the five colleges named. This State court action will hereafter be referred to as the Amherst College case.

The defendants also filed pleas with supporting answers to the cross-bill. Pleas similar to that filed by Marietta College (Record, Vol. 1, pp. 277-291) were filed by Cornell University, Bowdoin College, Yale College, Dartmouth College, Wesleyan University, Columbia University and Adelbert College. Pleas similar to that filed by Hamilton College (Record, Vol. 1, pp. 293-305) were filed by the Northwestern University, Union Theological Seminary, Lafayette College, Amherst College, Rochester University and Williams College.

Upon replications proofs were taken in each action, and after final hearing a decree was rendered sustaining the pleas and dismissing the bill and cross-bill as to each of these defendants (Record, Vol. IV., pp. 777-783). From this decree a direct appeal is taken by the complainants and cross-complainant to this Court.

Statement of Facts.

1. *The execution and probate of the will of 1884 and its codicils.*

This controversy relates to the estate of Daniel B. Fayerweather, deceased.

On October 6, 1884, Mr. Fayerweather executed a will in which, after leaving a legacy of ten thousand dollars and a devise of his house and stable in the City of New York and an annuity of fifteen thousand dollars a year to his wife, and after giving specific legacies to his three nieces (his only next of kin), Lucy J. Beardsley, Mary W. Achter and Emma S. Drury (now Fayerweather) and after

giving certain legacies to hospitals he, by the ninth paragraph of his will, made specific legacies to twenty colleges, and by the tenth paragraph gave the residue of his estate to his executors in trust to divide the same among the institutions mentioned in the ninth paragraph, share and share alike. Justus L. Bulkley and Thomas G. Ritch were named as executors (Record, Vol. IV., p. 183). By a codicil executed December 13, 1884, the bequest of the residuary estate was revoked and by a new paragraph the residuary estate was left to Justus L. Bulkley and Thomas G. Ritch individually (*Id.*, p. 189). By a second codicil executed January 7, 1888, Mr. Henry B. Vaughan was added to the number of executors (*Id.*, p. 191).

A third codicil, which increased the amount of the legacies to the nieces, Mrs. Achter and Mrs. Drury, and added a number of specific legacies, was executed March 19, 1889 (*Id.*, p. 193). On November 15, 1890, he executed a fourth codicil by which his residuary estate was left to Messrs. Bulkley, Ritch and Vaughan "to them and their heirs forever" (*Id.*, p. 196).

Mr. Fayerweather died November 15, 1890.

At the date of the execution of his will and at all times thereafter, the following statute of the State of New York was in force:

> "No person having a husband, wife, child, or parent, shall by his or her last will and testament devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half of his or her estate after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)" (Laws 1860, Ch. 360, Sec. 1).

Mr. Fayerweather left a wife but no child or parent.

The will and codicils were offered for probate in the Surrogate's Court of the County of New York.

Objections to the probate of the will and codicils were filed by the widow, and objections to the probate of the fourth codicil were filed by Mrs. Beardsley, Emma S. Fayerweather and Mrs. Achter. These objections were in the ordinary form and were to the effect that the will and codicils were not executed as required by law, that the testator was not of sound and disposing mind and memory, and that the will and codicils were procured by undue influence. Hearings were had before the Surrogate, and on February 17, 1891, he announced his intention to admit the will to probate. On February 24, 1891, Messrs. Bulkley, Ritch and Vaughan executed what is known as a deed of gift, in which they undertook to dispose of the residuary estate in favor of various persons and institutions, including only a part of those institutions named in the ninth paragraph, moved as they said by a desire to make such use of the residuary estate as in their judgment would best honor the memory of Mr. Fayerweather. On February 25, 1891, the will was admitted to probate, but the contest over the codicils continued.

On March 5, 1891, the widow and next of kin consented in consideration of the sum of $310,000, to the probate of the will and codicils as propounded and agreed to release the estate from all claims, except those to which they were entitled under the provisions of the will, and subsequently they executed formal agreements and releases in full settlement of the contest of the will of Mr. Fayerweather or concerning his estate, and releasing his executors from all claims and demands whatsoever. Thereupon the will and codicils were admitted to probate.

2. *The Amherst College litigation.*

Subsequently an action was brought in the Supreme Court of the State of New York by the widow, which was continued after her death by her executors, against the executors of her husband's estate, the donees in the deed of gift and the colleges, seeking to set aside the settlement and re-

leases above referred to, and to establish a trust in the residuary estate in behalf of the widow and next of kin on the ground that the gifts to charities exceed the one-half of the estate and were to such excess invalid. In that action five colleges (Amherst, Williams, Dartmouth, Rochester and Hamilton) interposed an answer and counterclaim, asserting that the residuary gift was made upon a constructive trust for the twenty colleges named in the Ninth Paragraph of the will. That action was brought to trial and the complaint was dismissed by default, and thereupon the five colleges named brought an action in the same court, in which the executors, the donees in the deed of gift and the widow and next of kin, together with the other colleges named in the Ninth Paragraph, were made parties defendant. The object of that action was to establish a constructive trust in the residuary estate in favor of the colleges named in the Ninth Paragraph, upon the ground that it had been given to the legatees upon their promise to divide it equally between those colleges.

(1.) *The issue in the Amherst College Case.* The complaint in the Amherst College case (Record, Vol. 1, p. 26) alleged the making of the will, its probate and the settlement and releases as above stated. It asserted that the residuary estate had been left to Messrs. Ritch, Bulkley and Vaughan by the testator upon their express promise to divide it among the colleges named in the Ninth Paragraph of the will, after giving $100,000 to Northwestern University.

It alleged in its sixth paragraph that upon the death of Mr. Fayerweather his will and codicils were offered for probate on due notice to the widow and next of kin, and that they appeared and interposed objections; that the objections to the will were withdrawn and that after a contest of the probate of the codicils Bulkley, Ritch and Vaughan, acting as trustees for the twenty colleges, effected a settlement with the widow and next of kin, whereby

they agreed to pay to the widow and next of kin out of the funds of the estate $310,000, and in consideration thereof the widow and next of kin agreed to withdraw their contest and release all their interest in the estate and discharge the same of and from all claims and demands whatsoever on their part (Record, Vol. 1, p. 37), and consent to the probate of the will and codicils, and that this agreement and consent were given with full knowledge of the promise by Ritch, Bulkley and Vaughan that the property left to them should be divided among the colleges named in the ninth paragraph of the will.

The executors of the widow and the nieces interposed an answer (Record, vol. 1, p. 42), in which by way of defense and counterclaim, and as ground for the affirmative relief prayed for, they specifically alleged the making of the will of 1884 and the codicils, and averred that the gift of the residuary estate was upon a constructive trust for the twenty colleges as asserted by them, but that the trust was void under the Act of 1860, cited above; that the settlement and releases had been procured by fraud and should be set aside, and asked that it be adjudged that they were entitled to the residuary estate. The answer contains the following averment:

> "It is not intended by anything in this answer contained to deny or dispute the right of the colleges named in the ninth clause of said will to an equal division among themselves of the entire difference between one full half part of the estate of said Daniel B. Fayerweather remaining after the payment of his debts and the aggregate of all the specific devises and bequests made by said will and codicils to benevolent, charitable, literary, scientific, religious or missionary societies, associations or corporations, including the $100,000 to said Northwestern University, at Evanston, Illinois, as aforesaid, provided said aggregate does not exceed said one-half; but these defendants claim that, under and pursuant to the laws of the State of New York,

> the widow and heirs at law and next of kin of said Daniel B. Fayerweather, deceased, are entitled to the excess of said aggregate, if any, over such one-half, and also to so much of said residuary estate as may exceed said one-half so computed" (Record, Vol. 1, p. 58).

The prayer of the complaint among other things asked:

> "That the ultimate rights of the plaintiffs as between them and each of them and every of the other defendants herein be determined by the judgment in this action in accordance with the allegations of this complaint, and the prayer hereinbefore contained."

The answer of the widow and next of kin made the following demand:

> "That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief therein."

The donees of the deed of gift, who were defendants in that action, either submitted their rights to the Court or alleged that the gift of the residuary estate to Messrs. Ritch, Bulkley and Vaughan was not upon an enforcible trust, and that the widow and next of kin had released their interest in the estate and that the donees were, therefore, entitled to their respective interests under the deed of gift.

(2.) *The trial.*—The record (Vol. 3, p. 580) is before the Court. It shows that the widow and next of kin examined many witnesses, introduced numerous documents and exhibits and strenuously argued in support of their contention that the settlement and releases had been obtained by fraud. None of the testimony offered by them upon this subject was excluded as irrelevant to the issue. They were undoubtedly afforded an opportunity to present all

the evidence which they desired to submit upon this issue.

The plaintiffs argued the case upon three propositions:

(1.) That the facts established a constructive trust in the gift to Ritch, Bulkley and Vaughan in favor of the colleges.

(2.) That the trust was not invalid under the Act of 1860, because it was not a testamentary gift to the colleges, but a gift to individuals to which equity attached a trust for the colleges; and

(3.) That, in any event, the releases obtained by the residuary legatees operated to cut off the rights of the widow and next of kin, and that therefore the trust was good notwithstanding the Act of 1860.

The widow and the next of kin argued:

(1.) That the gift to Ritch, Bulkley and Vaughan was upon a constructive trust in favor of the colleges.

(2.) That the trust was invalid under the Act of 1860, because it was in effect a testamentary gift to the colleges.

(3.) That the releases were void, and hence that they were entitled to the residuary estate.

The executors and donees under the deed of gift contended:

(1.) That the gift to Ritch, Bulkley and Vaughan was absolute or at least not upon such a trust as was enforcible.

(2.) That the widow and next of kin had executed valid releases; and

(3.) That these releases enured to the benefit of the donees under the deed of gift.

Such was the nature of the controversy submitted to the trial Court.

(3.) *The decision of the trial Court in the Amherst College Case.*—Under the provisions of the Code of Civil Procedure, Sec. 1022, which had been amended during the period intervening between the submission of the case and its decision, it is provided that "the decision of the Court or the report of a referee, upon a trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct a judgment to be entered thereon; or the Court or referee may file a decision stating concisely the grounds upon which the issues have been decided and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll."

The Judge filed a decision stating concisely the grounds upon which the issue had been decided (Decision, Vol. I., p. 63).

The grounds stated were, that the defendants Ritch and Vaughan for themselves and on the part of Bulkley promised Mr. Fayerweather, and induced him to believe, that if he would make them residuary legatees they would sell and convert his estate into cash and divide it equally share and share alike among the twenty colleges named in the ninth paragraph of his will, after paying $100,000 to the Northwestern University, and that Mr. Fayerweather made Ritch, Bulkley and Vaughan his residuary legatees in reliance upon this promise and inducement and died leaving them his residuary legatees in the belief so induced, that they would distribute his residuary estate as aforesaid and that they had attempted to dispose of his estate in violation and disregard of the said promises. The Court directed judgment that the residuary estate was so held and received by the defendants in trust for the said in-

stitutions and that the defendants should be enjoined from distributing the residuary estate under the deed of gift.

Upon this decision judgment was entered (Vol. I., p. 66) reciting the decision and adjudging that the residuary estate was held in trust for the colleges named; that the trust was to sell and convert the estate into cash and divide it in the manner prescribed, and restraining the defendants Ritch, Bulkley and Vaughan from distributing the residuary estate or any part thereof under the deed of gift, or otherwise, except as directed in said judgment.

At the time of making the decision Judge Truax, before whom the case was tried, handed down an opinion (see Trustees of Amherst College *vs.* Ritch, 10 Misc., 503; 64 State Reporter, 758, Record, Vol. IV., p. 20), in which, after reviewing the evidence and the authorities and reaching the conclusion that the residuary estate was left upon a trust for the colleges, he further discusses the effect of the Act of 1860 and reaches the conclusion that the gift to the individual legatees was not within the prohibition of that statute.

In that opinion he makes use of the following language:

> "The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

Judge Truax has been called as a witness for the complainants in this suit, and although his evidence is not before the Court in the original action and upon the proofs in the Hamilton College case (see Order and Opinion of Judge Lacombe and Defendants' Proofs in Fayerweather Case, pp. 167-168), yet it is before the Court in the cross-suit. The evidence was received under objection and exception. He testified that he reached the conclusion that the

residuary estate passed under the trust to the colleges, and that the widow and next of kin therefore had no interest to release, and that consequently it became unnecessary for him to consider the question propounded by the widow and next of kin (Vol. II., pp. 522-525).

(4.) *The decision at General Term in the Amherst College Case.*—The widow and next of kin, as well as the executors and donees under the deed of gift, appealed from the judgment to the General Term of the Supreme Court then composed of three judges. At the time this appeal was taken the Code of Civil Procedure, by an amendment which went into effect June 1, 1894 (Laws of 1894, chap. 688), provided that whenever judgment was entered upon a short form of decision, as in this case, reciting merely the grounds of decision and not stating separately the facts found "the defeated party may file an exception to such decision in which case, on an appeal from the judgment entered thereon, upon a case containing exceptions, the General Term of the Court in which the action is pending shall review all questions of fact and law and may either modify or affirm the judgment, or order appealed from, award a new trial, *or grant to either party such judgment as either party may be entitled to.*"

Laws of 1894, Chap. 688, Code of Civil Pro., Sec. 1022.

These complainants filed an exception to the decision at Special Term and to leave no doubt as to the character and effect of this exception, it recites that "it is made pursuant to the provisions of Sec. 1022 of the Code of Civil Procedure as amended in the year 1894" (Defendants' Proofs, Record, Vol. IV., p. 10).

The complainants thereupon prepared a case containing exceptions, upon which the appeal was heard at General Term (Defendants' Proofs, p. 3).

The case and exceptions is before the Court, and

the Court will take judicial notice, that it is, what is known to the law of the State of New York, as a case and exceptions, that is, a reproduction of the evidence upon the trial.

The General Term had before it the precise record upon which the Special Term acted. All the evidence as to the invalidity of the releases was before that Court. Extended arguments with reference to the evidence so submitted was presented both orally and by briefs on the part of the complainants in support of their contention as to the invalidity of the releases, and they requested that Court to pass upon that issue (see Defendants' Proofs, Book of Briefs, p. 153).

The General Term under the amendment (Laws of 1894, c. 688) cited above, had jurisdiction "to grant to either party such judgment as such party may be entitled to." That Court affirmed the judgment, and thereupon a judgment was rendered at the General Term (Record, Vol. IV., pp. 63–69.

The Code provides as follows (Code of Civ. Pro., § 1317):

> "Upon an appeal from a judgment or an order, the Appellate Division of the Supreme Court, or General Term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money, or other relief, which was awarded to him by the judgment so affirmed."

Upon the affirmance of the judgment two opinions were filed (see 91 Hun, p. 509, Record, Vol. IV., pp. 52, 59), one by Judge Follett, concurred in by Judge Parker, and the other by Chief Justice Van

Brunt. In the former of these opinions it is said (p. 55):

"The executors of the testator's widow and two of his heirs at law and next of kin seek to have the residuary clause declared invalid, under Chapter 360 of the Laws of 1860 (quoting the section). The difficulty with their contention is that the widow and heirs released all their interest in the estate for valuable considerations paid to them. This statute was designed for the protection of husbands, wives, next of kin and heirs at law, but it does not in anywise prevent them from releasing to educational corporations the benefits which they might have secured by resisting wills made in contravention of the statute. It is urged that these releases were procured by fraud and undue influence. There is no evidence in the record justifying this contention. The terms of settlement were agreed on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy, and in the settlement, by distinguished counsel, and acted under their advice. The residuary legatees not having any personal interest in the residuary estate, and the widow and heirs having released all their interest therein, there is no person who is entitled to raise the question that the residuary clause is void under the Act of 1860.

No person or corporation, except the State in certain cases, can impeach the validity of the disposition of property by will, unless the contestant, if successful, will acquire some interest under the statutes of descent or of distribution, or as devisee or legatee, in the property attempted to be disposed of by the will; and if the person entitled to contest a will, or some one or more of its provisions, voluntarily and for a valuable consideration, received after the testator's death, with full knowledge of the invalidity of the will, divests himself of all interest in the property attempted to be disposed of by it, he cannot impeach its validity."

Judge Van Brunt differed with the majority of the Court as to the extent of the application of the Act of 1860. He said (p. 59):

> "The testator left him surviving a widow, who was the only person who could call into operation for her protection the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked or set aside. There is, consequently no person for whose benefit the statute can operate. No rights of heirs and next of kin have been infringed upon, because the trust does not contravene any statute for their benefit, and is not the subject of attack by them. If it were, they have also executed a release of their interest in the estate in the same manner as the widow."

Mr. Justice Parker was called as a witness on behalf of the defendants, and testified that the question as to the validity of the releases was argued before the General Term, by oral argument as well as by printed brief, and that the record upon the appeal was examined by the Court, and the Court decided that there was no evidence in the record to justify the claim that the releases were procured by fraud or undue influence (Record, Vol. 3, pp. 442-3).

It should be stated, however, that before giving his testimony, Mr. Justice Parker said:

> "I desire to enter my earnest protest against "this method of ascertaining what has been "decided by the Courts. I should deem it to "be my duty to refuse to be interrogated on "this subject, were it not that Mr. Justice "Truax has seen fit, mistakenly I think, to "give testimony as to what has been decided "at Special Term. This course on his part "persuades me to give testimony, lest per-"chance a refusal might be misunderstood" (Record, Vol. III., p. 440).

(5.) *The decision in the Court of Appeals in the Amherst College Case.*—An appeal was taken by the widow and next of kin to the Court of Appeals,

where the judgment was again affirmed. The opinion of that Court will be found in 151 N. Y., p. 282 (Record, Vol. IV., pp. 70–112). The Court there considered the question of fraud in the releases.

The Court said (151 N. Y., 321):

> "We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found, and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court, all the facts warranted by the evidence and necessary to support the judgments below, are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than we have when specific findings are made by the Special Term and affirmed by the General Term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and the next of kin in procuring releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power of review. The only ground upon which it is claimed that the alleged fraud was so conclusively proved as not to involve a question of fact, is that the residuary legatees did not state that there was a secret trust in favor of the colleges named in the ninth article of the will, and that the effect of that trust was to vest the bulk of the residuary estate in the widow and next of kin. What are the facts? The residuary legatees were engaged in settling a lawsuit with hostile parties, toward whom they sustained no fiduciary relation, and who were represented by counsel of the highest standing and ability. Substantially all of the material facts had been disclosed by the evidence taken during the trial, in which both parties to the releases were then engaged. The residuary

lagatees had been examined at length upon the witness stand by counsel for the widow and next of kin, who had ample opportunity to make full discovery. While they took the position, to which they still adhere, that the gift to them was absolute, that position was not acquiesced in by the widow and nieces, for their counsel openly claimed and argued in Surrogate's Court that there was a secret trust, which was invalid, and that their clients were entitled to the residuary estate. While there may have been concealment of opinions, there was no concealment of the facts upon which these opinions were based, The residuary legatees were not bound to volunteer their opinions, even if they then thought there was a secret trust. One who is trying to settle litigation has the right to keep his opinion on the merits to himself. The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases so far as the parties to those instruments were concerned. They dealt with each other, at arm's length, as adversary parties knowing the substantial facts, and they are presumed to have had them in mind when the releases were executed, and to have covered by the language used all questions to which those facts could give rise. Even if we hold, when we reach the question, that there was a secret trust, that will not convict the residuary legatees of fraud in claiming the contrary before the Surrogate, for one who neither withholds nor misstates the facts cannot be adjudged guilty of fraud simply because the courts finally decide the law to be other than he clamed it to be while engaged in litigation over the subject. Such a rule would make nearly every unsuccessful litigant guilty of fraud. From this statement it is obvious that there was no such concealment as would require the Court, if the trial were before a jury, to direct a verdict on the basis of fraud proved beyond question."

(6.) *Motions in the Court of Appeals in the Amherst College Case.*—The judgment having been

affirmed, the complainants moved in the Court of Appeals for a reargument and also for an amendment of the remittitur so as to direct the Justice before whom the action was tried to consider the evidence given before him concerning the agreements to release and the releases, and to pass upon the same and to determine whether the said agreement and releases were valid and binding.

This motion was based upon an affidavit of the attorney for the complainants, claiming that the complainants had been deprived of due process of law by reason of the failure of the trial Justice to make a specific finding upon the validity of the releases and upou the ground that that issue had not been decided in the trial Court. This motion was denied (Record, Vol. III., pp. 113–142).

The cause then proceeded to final judgment, which was entered July 6, 1897 (Vol. IV., pp. 167–182), by which the report of the Referee appointed to state the accounts of the executors was confirmed, the amount of the estate ascertained and its distribution directed.

3. *The litigation in the United States Courts.*

After final judgment had been entered in the Amherst College case these complainants instituted this suit in the United States Circuit Court. The original bill of complaint was filed June 29, 1897 (it is not printed as filed). The form of the original bill can be ascertained only by striking from the bill as printed (Record, Vol. IV., p. 1) the amendments allowed by the order of July 1, 1899 (Record, Vol. II., p. 621).

It undertook to set out a cause of action to reach the residuary estate of Mr. Fayerweather and to set aside the Amherst College judgment as a cloud on the title of complainants as heirs and next of kin of Mr. Fayerweather, and to set aside the proceedings in the Amherst College case and asserted that the issue as to the validity of the releases had not been passed upon in that action by the trial Court; that

the general term, although having jurisdiction, did not determine that issue, and that the Court of Appeals affirmed the judgment on the fiction that the issue had been determined by the lower courts, and that thus the complainants had been deprived of their property without due process of law. It alleged that the residuary estate had been left to the legatees upon a constructive trust for the colleges, which was void under the Statute of 1860, and that the settlement and releases were fraudulent and invalid, and that Ritch, Buckley & Vaughan held the residuary estate as trustees for them.

Attached to the bill of complaint as exhibits were the complaint and the answer of the widow and nieces in the Amherst College case, the decision of Judge Truax and the judgment at Special Term, but not the judgment at the General Term or in the Court of Appeals, or the final judgment.

Demurrers to this bill were filed by Mr. Fayerweather's executors and by the Union Theological Seminary which were overruled by Judge Wheeler (see Opinion, Record, Vol. 1, p. 83). Subsequently a motion for an injunction restraining the distribution of the estate under the Amherst College judgment was made by complainants before Judge Lacombe, and was granted with the following observation in the opinion of the Judge:

"In view of Judge Wheeler's opinion upon the decision of the demurrer, it must be assumed that there has been no adjudication in any court sufficient to constitute due process of law as to the validity of the releases which complainants impeach as being obtained by fraud" (Opinion, Record, Vol. 1, p. 96).

Upon that motion the entire record in the Amherst College case was before the Court.

From the order made on that motion an appeal was taken to the Circuit Court of Appeals for the Second Circuit, where the order was reversed upon

an opinion written by Mr. Justice Wallace, saying among other things:

> "The proposition that their (the com-
> "plainants') rights had been disposed of with-
> "out 'due process of law' is too preposterous
> "to merit discussion. They have had a trial
> "according to the settled course of judicial
> "proceedings; they have been heard and heard
> "*ad libitum* though without avail" (Record, Vol. 1, pp. 103, 105).

And also

> "Inasmuch as we are satisfied that the
> "complainants cannot ultimately prevail
> 'upon the case made by their bill we con-
> "clude that they are not entitled to prelim-
> "inary relief."

A plea was filed by Hamilton College to the original bill setting up the proceedings in the Amherst College case as a bar to the action (Record, Vol. 1, p. 176).

Upon this plea proofs were taken by Hamilton College (Record, Vol. III., p. 578).

Under date of July 1, 1899, the original bill was amended (Record, Vol. IV., p. 621) by order. The bill as amended is printed in the record (Vol. 1, p. 1). Hamilton College having elected, pursuant to the order of amendment, to stand upon its plea and the evidence already taken, the issue was brought to a hearing and the plea of Hamilton College to the amended bill was sustained (Record, Vol. IV., p. 624) and the amended bill was dismissed as to that college (Record, Vol. IV., p. 629).

By the amendment allowed there was inserted in the charging part of the bill of complaint an allegation that the decrees of the Surrogate admitting the will and codicil to probate were fraudulent and void and should be set aside, and that the complainants should be relieved therefrom, and that the Court should establish and compel due performance of the true and lawful last will and testament of Daniel B.

Fayerweather, and in lieu of any such, distribution of the estate of Daniel B. Fayerweather according to law (Record, Vol. IV., p. 622). The word "not" was also inserted in the paragraph respecting the General Term so as to make it read that the General Term had no jurisdiction to determine the validity of the settlement and releases.

The cross-bill filed by John B. Reynolds, as executor of Mrs. Fayerweather, attacks the validity of the will of 1884 and the codicils as having been obtained by undue influence and fraud. It attacks the probate of that will upon the ground that it was fraudulently obtained and that the decrees of the Surrogate were procured by fraud, duress and intimidation. It sets up a will made by Mr. Fayerweather in October, 1880, and alleges that one-half of his estate became vested in his executors in that will and that the remainder passed by operation of law to the heirs and next of kin because the attempted disposition of it under that will was unlawful under the Act of 1860. It prays for a decree adjudging the will of 1880 to be the last will of Mr. Fayerweather, setting aside the decrees of the Surrogate's Court and that it be determined that the will of 1880 as to one-half of the estate was invalid and to that extent the estate passed to the complainants and to the next of kin, and for an accounting and for other relief.

All other pleading to the amended bill of complaint and to the cross-bill having been withdrawn, pleas were filed by each of the colleges setting out the proceedings in the Amherst College case as a bar to any right of recovery by the complainants or cross-complainant as above stated (see *ante*, p. 1).

The pleas are accompanied with an answer explicitly denying the fraud or combination charged in the bill of complaint and cross-bill, as required by the thirty-second equity rule.

The complainants and cross-complainant took a large amount of testimony, most of which these defendants regard as wholly immaterial

under the issue framed by the pleas. This evidence was directed to the competency of Mr. Fayerweather to make the codicil of November 15, 1890, by which the residuary estate was devised to Bulkley, Ritch and Vaughan (Record, Vol. IV., p. 196), and in support of the allegations of fraud in procuring the agreements and releases under which that codicil was admitted to probate.

They also offered in evidence a deposition of the Hon. Charles H. Truax, the justice of the Supreme Court of the State of New York before whom the Amherst College case was tried for the purpose of showing that the issue raised by the complainants and cross-complainant by their answers in that case had not been decided by him. To this testimony the executors introduced certain testimony in reply (Record, Vol. 3) in addition to the proofs taken by Hamilton College. They also introduced the deposition of Hon. Alton B. Parker, one of the Justice who held General Term, at which the appeal in Amherst College case was heard (Record, Vol. III., pp. 439–458)

Some of the colleges stood solely upon the proofs submitted by Hamilton College, and others upon that proof and additional proof submitted by the executors. (See order as to pleadings and records, Record, Vol. IV., pp. 657-664.) Hamilton, Bowdoin, Amherst, Williams, Union Theological Seminary and the Northwestern University s and upon the proofs submitted by Hamilton College. The other defendants above named upon those proofs and also upon the proofs submitted by the executors.

About January 1, 1902, a cross-bill was filed by Joshua M. Fiero and was served on some of the defendants. This cross-bill sought to set aside the probate of the will of 1884 and the codicils and to establish a will of 1880 or in the alternative that of 1878. On January 17, 1902, an order was made dismissing this cross-bill and striking it from the files of the Court " Upon the sole ground that this Court has no jurisdiction to grant the relief prayed for in

the said cross-bill or any part of said relief." (See cross-bill Record, Vol. I., pp. 328-345.)

The case came on for hearing before Judge Lacombe, who wrote a brief opinion (Record, Vol. IV., p. 775). A final decree was entered October 10, 1902 (Record, Vol. IV., p. 777). It recites that "the Court after due advisement held and decided that the cause of action alleged in the said bill and that alleged in the cross-bill were barred by an adjudication in a prior litigation between the same parties or their predecessors or privies, to wit, by the judgment in an action in the Supreme Court of the State of New York wherein the Trustees of Amherst College and others were plaintiffs and Thomas G. Ritch and others were defendants," and adjudges and decrees that the pleas to the bill and cross-bill are sustained and that the bill and cross-bill be dismissed.

I.

This Court is without jurisdiction on direct appeal and the appeal should be dismissed.

The right to a direct appeal to this Court, if it exists, is found in either the first or the fourth clause of Section 5 of Chapter 517 of the Laws of 1891 (26 Stat. L., 826). These clauses read as follows:

> "Appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the

Supreme Court from the Court below for decision.

* * * * *

In any case that involves the construction or application of the Constitution of the United States."

1. If the appeal is taken under the first clause, it must be dismissed for the following reasons:

The bill and cross-bill were dismissed after hearing on the pleas and answers, upon a finding that the judgment of the Supreme Court of the State of New York pleaded in bar was an adjudication of the validity of releases executed by the complainant's decedent and the cross complainants relinquishing the interest in Mr. Fayerweather's estate which they here seek to recover (Record, Vol. IV., p. 775).

(1) The Circuit Court exercised jurisdiction, and even if the jurisdiction of the Court had been in issue (though it was not), the appellants can not seek a review by this Court of a question determined in their favor.

U. S. *vs.* Jahn, 155 U. S., 109.
Anglo-American Provision Co. *vs.* Davis Provision Co., 191 U. S., 376.

(2.) Moreover, no question of jurisdiction has been certified to this Court, nor was any question of federal jurisdiction involved in the decision by the Circuit Court dismissing the bill and cross-bill. For this reason a direct appeal under the first clause must be dismissed.

Filhiol *vs.* Torney, 194 U. S., 356,
and cases cited.

(3.) If we assume that the Circuit Court held that it had no power to entertain a suit to set aside a will, or to establish a will (although both the bill and cross-bill were dismissed solely upon the ground that the causes of action stated were barred by the judgment in the Amherst College case, and no reference is made in the decree to any want of power to en-

tertain the bill and cross-bill), still the jurisdiction of the Circuit Court as to its Federal jurisdiction was not in issue, but the question was merely one as to the equity powers of the Court. Hence a direct appeal to this Court on the ground of jurisdiction is unauthorized.

Louisville Trust Co. *v.* Knott, 191 U. S., 225; Bache *v.* Hunt, 193 U. S., 523; Blythe *v.* Hinckley, 173 U. S., 501-506; Huntington *v.* Laidley, 176 U. S., 668, 679.

(4.) Nor can the appeal from the decree be sustained under the first clause on the ground that the order striking the Fiero cross-bill from the files recites that it is made "upon the sole ground that this Court has no jurisdiction to grant the relief prayed for in the said cross-bill or any part of said relief" (Record, Vol. 1, p. 346, fol. 691).

The relief asked in that cross-bill was that the probate of Mr. Fayerweather's will should be annulled and the parties be enjoined from taking any advantage of the decrees establishing the will, and that a will alleged to have been made by Mr. Fayerweather in 1880, or in the alternative a will alleged to have been made by him in 1878, be established as his last will and testament in so far as it might under the statute of wills be established, and that as to the residuum the estate be decreed to be disposed of as in the case of intestacy (Record, Vol. 1, p. 337, fol. 675).

The question whether the Circuit Court had power to grant this relief upon the facts stated in the Fiero cross-bill was not a question of Federal jurisdiction, but was one merely of equity powers, hence a direct appeal to this Court on the ground of jurisdiction is unauthorized.

Louisville Trust Co. *v.* Knott, 191 U. S., 225; Bache *v.* Hunt, 193 U. S., 523; Blythe *v.* Hinckley, 173 U. S., 501-506; Huntington *v.* Laidley, 176 U. S., 668, 679.

(5.) Nor can the appellants support this appeal as presenting a question of jurisdiction under that order since they have not appealed from the order. If that order is here for review it is so only under the appeals from the decrees. The order was made January 17, 1902 (Record, Vol. 1, p. 345); the appeals from the decrees were taken by the complainants and cross complainant October 15, 1903. These appeals are merely from the final decree dismissing the bill and cross-bill (Record, Vol. IV, pp. 840, 857, fols. 1627-1667). Hence, the Fiero order, if here for review, is so only incidentally and as ancillary to the appeals from the decrees. There is no question of jurisdiction certified to this Court as arising on the direct appeal, nor any reference to any such question upon that appeal. If, then, the purpose was to present on this appeal an error arising incidentally from a failure to exercise jurisdiction of the Fiero cross-bill, it was necessary that the question of jurisdiction should be certified to this Court.

Chappell *vs.* United States, 160 U. S., 499; Van Wagenen *vs.* Sewall, 160 U. S., 369.

(6.) The only party who could be heard here in any event to ask relief on account of the order striking out Mr. Fiero's cross bill is Mr. Fiero himself. He is not appealing either from the order or from any judgment in the case. No other party in the case has any right to insist that Fiero's cross-bill should have been retained so long as he himself abandons it.

2. The direct appeal cannot be sustained under the fourth clause, since the case does not involve the construction or application of the Constitution of the United States.

(1.) The issue under the pleas was whether the State court judgment was a bar to the rights of action set up in the bill and cross-bill.

If the Amherst College judgment was unimpeachable the question whether it was a bar is a mixed question of fact and law, the determination of which involved only general principles of law and did not involve the construction or application of the Constitution. The contention that the judgment was not a bar because the validity of the releases had not been determined by a court having jurisdiction presented a question of the jurisdiction of the State court. That was a question involving the construction and application of the laws of the State. No constitutional question could appear until it was found that the judgment had been rendered by a court without jurisdiction. But this was not found; on the contrary, the Circuit Court held that the judgment of the State court was a bar because it adjudged the validity of the releases (Record, Vol. IV., p. 775). This was necessarily a determination that the issue as to the validity of the releases had been decided in that action by a tribunal having jurisdiction under the laws of the State of New York to determine the issue, hence no constitutional question arose or could arise except contingently. This is so because it is not claimed that the law of the State as construed deprived the appellants of due process, but merely that the law was erroneously construed. It is not claimed that a decision of the question of fact by the General Term was not due process, but solely that the General Term had no jurisdiction to decide the fact which is not a constitutional question. Under such circumstances, the construction and application of the Constitution cannot be said to be involved so as to authorize a direct appeal to this Court.

Cosmopolitan Mining Co. *v.* Walsh, 193 U. S., 460; Carey *v.* Houston & T. C. R. Co., 150 U. S., 170; New Orleans Water Works Co. *v.* Louisiana, 185 U. S., 336; Forsyth *v.* Vehemeyer, 177 U. S., 177; Iowa Central R. Co., *v.* Iowa, 160 U.S., 389.

(2.) But if this Court is at liberty, in passing upon the right to a direct appeal, to review the determination of Mr. Justice Lacombe as to the proper construction and application of the laws of the State of New York in the State court action, it will be found that there is nothing either in the laws themselves or in their application which even by a strained construction can be said to present a question of due process of law.

Previous to 1894 in cases tried by a Court without a jury it was required by the Code of Civil Procedure of the State of New York that the Court or Referee should make specific findings of fact and conclusions of law.

By a long line of decisions it was settled by the Court of Appeals that although a finding of a fact deemed essential to support the judgment had not been made at the Trial Term, such fact might be supplied in that Court in support of the judgment, if warranted by the evidence, where the evidence upon which the Trial Term acted was submitted to that Court upon a case and exceptions or bill of exceptions, and this is the continuing rule in that Court to the present time.

First National Bank *v.* Chalmers, 144 N. Y., 432–436; Osborn *v.* Green, 161 N. Y., 353; Ogden *v.* Alexander, 140 N. Y., 356; Marvin *v.* Brewster Iron Co., 55 N. Y., 538, 547; Newman *v.* Frost, 52 N. Y., 422; Hays *v.* Miller, 70 N. Y., 112–116; Meyer *v.* Lathrop, 73 N. Y., 315, 321; Sheldon *v.* Sherman, 42 N. Y., 484, 489; Grant *v.* Morse, 22 N. Y., 323; Rider *v.* Powell, 28 N. Y., 310; Oberlander *v.* Spies, 45 N. Y., 175; Page *v.* Met. El. R., 10 Misc., 134; Milleneaux *v.* Terwilliger, 50 Hun, 526.

In 1894 the amendment to the Code, Section 1022, cited above (p. 16) permitting in the alternative a decision stating separately the facts and conclusions

of law or a concise decision was adopted. This statute went into effect after the trial, but before the decision of the Fayerweather case and when the decision was about to be announced Mr. Justice Truax submitted to counsel whether they preferred that a specific findings of facts should be made or a general concise decision. Counsel for the various parties including counsel for the widow and next of kin, joined in requesting that a general decision should be rendered (Record, Vol. III, p. 554, fol. 1108), and accordingly a general decision was made (Record, Vol. I, p. 63, fol. 125). To this decision an exception was filed by these appellants and an appeal was taken to the General Term. The appeal to the General Term was heard upon a case and exceptions prepared by these appellants containing *ipsissimis verbis* the evidence before Mr. Justice Truax, including all the evidence submitted by these appellants in support of their contention that the releases had been obtained by fraud. The appeal book upon which the appeal was argued at General Term contains the statement that "The record contains all the evidence and testimony given on the trial of this cause" (Appeal Book, p. 7).

At the General Term these appellants argued on the evidence in support of their contention (see Vol. of Briefs, pp. 1–190), and the Court passed upon the question of fact as appears from the citations from the opinions quoted above (pp. 17, 18 and 19). Mr. Justice Parker, who was a member of the court, was called as a witness before Judge Lacombe and testified that the questions of fact as to the validity of the releases were considered and passed upon by the General Term (Record, Vol. III., pp. 438–561).

At the time the decision was made at General Term, that Court, by Section 1022, had power "to review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or *grant to either party such judgment as such party may be entitled to.*"

The clause in italics was new, having been added to the delegation of powers granted to the General Term by the provisions of the code by an amendment which took effect in June, 1894 (Laws of 1894, ch. 688).

The General Term in December, 1895, in the case of Harding *v.* Elliott (91 Hun, 502) (decided at the same term at which the Amherst College case was decided), held that "under Section 1022 of the Code of Civil Procedure, when a judgment is upon a decision which does not state separately the facts found, this Court is required to review all questions of fact and law, and is authorized, *instead of granting a new trial, to grant to either party the judgment which the facts warrant.*" In that case the General Term reversing the trial Court, found that a transfer held valid by the Court below was, in fact, fraudulent upon the evidence, and granted judgment absolute for the appellant.

By an amendment of Section 1022, which went into effect January 1, 1896 (Laws of 1895, ch. 946), the words of the statute were changed so as to read, "*or grant to either party the judgment which the facts warrant.*"

The Appellate Division, which was substituted for the General Term by the change in the State Constitution, which went into effect January 1, 1896, gave the same construction to the amended section which had been given to the analogous language of the same section in Harding *v.* Elliott (Benedict *v.* Arnoux, 7 App. Div., 1; Ross *v.* Caywood, 16 App. Div., 591). The section as it stood from June, 1894, to January, 1896, in the particular we are now considering, has never been construed by the Court of Appeals. The section as amended in 1896 was first considered by that Court in 1897 in Edson *v.* Bartow (154 N. Y., 199), after the decision of the Amherst College case in that Court.

The Edson case was an action to establish a constructive trust against three legatees; the judgment at Special Term found that the facts did not justify

the finding of such a trust; the Appellate Division reversed this judgment as to one of the legatees and adjudged as to him that the trust was established by the evidence. The Court, commenting on the power of the Appellate Division to render this judgment, remarked that the words "or grant to either party the judgment which the facts warrant" were new, and that the ordering of judgment on a reversal was justified by the condition of the record, because it appeared that the facts were all disclosed, and on a new trial they could not be changed. But a reference to the statement of facts upon which the General Term acted, found at page 218 of the opinion, shows that the evidence was certainly such as might justify differences of conclusion and inference.

After that decision the Court of Appeals in 1898 held that the Appellate Division was not authorized to *reverse* a judgment and render judgment absolute for the appellant where there was an issue of fact, unless the facts were conceded or established by written instruments, or found in full by the trial Judge, or the evidence was undisputed and not susceptible of different inferences, thus overruling the case of Harding *v.* Elliott, *supra*, and reversing Benedict *v.* Arnoux and Ross *v.* Caywood, *supra* (Benedict *v.* Arnoux, 154 N. Y., 715; Ross *v.* Caywood, 162 N. Y., 259).

It is beyond dispute that from 1895 to 1898 the statute law of the State of New York, as construed by all the decisions of the courts of that State, authorized the General Term, where a judgment was entered upon a concise decision, to review all questions of fact and law, and instead of granting a new trial to grant to either party the judgment which the facts warrant, which included the affirmance of the judgment of the Court below, or the reversal of the judgment of the Court below and the granting of final judgment for the appellant upon the facts when they were before the Court on a case and exceptions.

This seems to be conceded by the senior counsel for the appellants. He says (see Brief of Hon. Charles Andrews, p. 16), "Until the decision of the case of Benedict *v.* Arnoux (154 N. Y., 126), decided by the Court of Appeals in 1898, the opinion was quite prevalent both at bench and bar that under Section 1022 full jurisdiction was vested in the General Term or Appellate Division to exercise an original jurisdiction on an appeal over the facts and to reverse or affirm and render final judgment in accordance with its findings of the facts."

The law of the State regarding the powers of the General Term were modified by the decision in Benedict *v.* Arnoux so that that Court had no jurisdiction to reverse a judgment upon the facts and grant judgment absolute for the appellant upon its own findings. But the Court of Appeals has never decided that the General Term is not authorized to *affirm* a judgment upon an appeal on a case and exceptions upon facts not specifically stated in a general concise decision. On the contrary, the power of the General Term in this regard has been continuously recognized ever since the adoption of the concise form of decision.

Johnstone *v.* O'Connor, 21 App. Div., 77; aff'd 162 N. Y., 639.
Keegan *v.* Smith, 60 App. Div., 168.
Gardner *v.* N. Y. Mutual Sav. & L. Ass'n, 67 App. Div., 141.
Multz *v.* Price, 91 App. Div., 116.

This is in accordance with the long established rule of the Court of Appeals above referred to.

The jurisdiction of the General Term upon such an appeal as was taken in the Amherst College case to review all questions of fact and law appearing upon the record and testimony, has never been questioned. The jurisdiction of that court to affirm the judgment below, in case upon such review it considers the judgment not to be erroneous, has never been questioned. The jurisdiction of that

court to reverse the judgment below, in case upon such review it considers the judgment to be erroneous, has never been questioned. The difference of opinion between the decisions as they were in 1895, when the General Term heard and decided the Amherst College case, and the subsequent decisions cited by the appellants here, relates merely to the extent and character of the judgment which it is competent for the General Term or Appellate Division to render in case of reversal. Under the decisions of the State of New York as they were in 1895, it was competent for the Court, in case of reversal, to proceed to render themselves such judgment as they considered the party entitled to. Under the later decisions, the Court is limited, in case of reversal, to ordering a new trial, unless it appears by the record that the party defeated below cannot possibly improve his position.

It thus appears that both parties to the appeal at the General Term in the Amherst College case invoked the exercise of an unquestioned and unquestionable jurisdiction by the General Term to review all questions of fact and law in the case and to affirm or reverse the judgment. In the exercise of that unquestionable jurisdiction the General Term did review all questions of fact and law and affirmed the judgment.

The power of the Court to affirm a judgment upon facts appearing in the evidence which are not stated in the findings exists, although neither the General Term nor the Appellate Division can under the practice formulate or add findings to the record (see Code, § 1317, quoted *supra*, p. 17). Thus where the General Term made additional findings and modified the judgment of the Court below, the Court of Appeals held that the additional findings might be disregarded since the General Term had no power to make them but that the facts stated in these findings were before the Court, because they were such as might be assumed

in the concise decision of the trial Court, since such a decision is equivalent to a general verdict (Cutter *v.* Gudebord, 168 N.Y., 512).

This ruling is in harmony with the Chancery practice.

Before the Code of Procedure, the rule in New York was that an appeal in an equity suit opened the whole matter and warranted a review on the evidence as well as upon the law. "The appeal to the Court in such cases," in the language of Chancellor Kent, "acts with all the plenitude of a court of equity of original jurisdiction" (Gelson *v.* Codwise, 1 Johns. Ch., 189–194; Dunham *v.* Watkins, 12 N. Y., 556.

The rule on appeals in chancery in United States courts is the same: "On the appeal in an equity suit the whole case is before the Court, and it is bound to decide the same as far as it is in a condition to be decided on its merits" (Waterloo Min. Co. *v* Doe, 82 Fed., 45 (C. C. A., 9 Cr.); Garsed *v.* Beall, 92 U. S., 684–695). "Chancery cases when brought here from the Circuit courts," said this Court in Murdock *v.* The Mayor, 20 Wall., 621, 622, "are brought for a trial *de novo* on all the evidence and pleadings in the case."

On the appeal to the Court of Appeals, that Court held that the concise decision authorized by Section 1022 had the effect of a general verdict rendered by a jury and that the same presumptions arise in its support, and that the Court could look into the evidence only to ascertain whether there were facts proved which would support the decision. We have quoted the language of the opinions of this Court on this subject above (*ante*, pp. 19–21):

This ruling of the Court of Appeals as to the effect of a concise form of decision has been adopted and approved in all the succeeding cases of that Court.

People *ex rel. v.* Barker, 152 N. Y., 431, 435; Bartlett *v.* Goodrich, 153 N. Y., 424; N. Y. Security & T. Co. *v.* Lip-

mann, 157 N. Y., 556; Petrie *v.* Trustees of Hamilton, 158 N. Y., 463; Garvey *v.* Long Is. R. R. Co., 159 N. Y., 328; Salomon *v.* Continental Fire Ins. Co., 160 N. Y., 598; Reed *v.* McCord, 160 N. Y., 334; Marden *v.* Dorthy, 160 N. Y., 46; Cons. El. Sta. Co. *v.* Atl. Trust, 161 N. Y., 611; Rodgers *v.* Clement, 162 N. Y., 427; Nat. Harrow Co. *v.* Bement & Sons, 163 N. Y., 510; Lamkin *v.* Palmer, 164 N. Y., 204; Carpenter *v.* Taylor, 164 N. Y., 182; Brokaw *v.* Duffy, 165 N. Y., 403; Woodbridge *v.* First Nat. Bank, 166 N. Y., 245; City of Niagara *v.* N. Y. Central, 168 N. Y., 611; Genet *v.* Del. & H. C. Co., 170 N. Y., 289; Critten *v.* Chem. Nat. Bk., 171 N. Y., 231, 233; Hutton *v.* Smith, 175 N. Y., 375; Sand *v.* Fietes, 173 N. Y., 647, 650.

The question of the proper exercise of its powers by the General Term in the Amherst College case was conclusively settled by the Court of Appeals. It appeared on the face of the record before that Court that in the decision made by Mr. Justice Truax there was no specific finding as to the validity of the releases. It appeared that the General Term had affirmed the judgment upon the ground that the evidence did not justify the claim that the releases were procured by fraud and undue influence. In affirming the judgment the Court of Appeals necessarily decided that the General Term had jurisdiction to render judgment upon that ground. If it were not so, it would have been its duty to have reversed the judgment for the reason that the General Term had exceeded its powers, as it did in the case of Benedict *vs.* Arnoux, and other cases, where the General Term undertook to find facts upon which to reverse the judgment.

If there were any doubt as to whether the question of the power of the General Term had been

presented to and passed upon by the Court of Appeals, it is put to rest by the motion subsequently made by complainants. That motion was for a reargument and to amend the remittitur so as to direct a trial at Special Term concerning the agreements to release and the releases, and to determine whether they were valid and binding (Record, Vol. IV., pp. 113-142).

In the affidavit submitted upon that motion, complainants called attention specifically to the decision of Judge Truax, and to the statement in his opinion cited above, and complained that the General Term had dealt with the agreements and releases and held that they were valid, and that in so doing it had acted beyond its power. Briefs were submitted by counsel for some of the colleges in support of the authority of the General Term to examine the evidence and sustain the judgment upon the facts.

If the want of jurisdiction of the General Term had not before been presented to the Court of Appeals, it was thus brought directly to their consideration, and the argument upon both sides as now presented was before that Court. It denied that motion, all the Judges concurring, and it thus declared that the General Term had jurisdiction to affirm a judgment upon the facts appearing in the evidence which had not been passed upon by the Court at Special Term. Federal courts are conclusively bound by the law thus settled and announced.

Sioux City T. B. W. Co. *v.* Trust Co. of N. A., 173 U. S., 99; M., K. & T. R. Co. *v.* McCann, 174 U. S., 580, Morley *v.* L. S. & M. S. Ry. Co., 146 U. S., 162.

3. This statement of the proceedings in the State court action demonstrates that no question of constitutional right is presented. In the language of Mr. Justice Wallace, at the Circuit Court of Appeals, "the proposition that their (the widow and next of kin) rights have been disposed of without

due process of law is too preposterous to merit discussion" (Record, Vol. 1, p. 105, fol. 210).

(1.) It is the settled law of this Court that the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court shall be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted and an opportunity afforded to defend against it.

Simon *v.* Craft, 182 U. S., 427; Louisville & N. R. Co. *v.* Schmidt, 177 U. S., 230; *Re* Robert W. Parsons, 191 U. S., 45.

> "We might go further and say with undoubted truth that there is nothing in the "Constitution to prevent any State from "adopting any system of laws or adjudica-"ture it sees fit for all or any part of its terri-"tory."
>
> Missouri *v.* Lewis, 101 U. S., 22.

(2.) No one can doubt but that the Legislature of the State of New York had a right consonant with the constitutional guaranty of due process of law to provide that in a case tried by a court without a jury or by a referee, the Court or Referee might make a decision stating separately the facts found and conclusions of law, or stating concisely the grounds upon which the issues were decided, and that such concise decision should have the effect of a general verdict by a jury, so that if upon a review by an appellate court upon the evidence the evidence was found to support the decision, the judgment must be affirmed, although there has been no specific finding of a material fact in the Court below.

Such a situation arises in the practice in the Federal courts. By Section 649 of the Revised Statutes it is provided that "Issues of facts in civil cases in any Circuit Court may be tried and determined by the Court without the intervention

of a jury whenever the parties or their attorneys of record file with the Clerk a stipulation, in writing, waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." Under this provision it is held by this Court and by the Circuit Court of Appeals that a general finding is as conclusive upon all matters of fact as the verdict of a jury (Martinton *v.* Fairbanks (112 U. S., 670), Lehnen *v.* Dickson (48 U. S., 71), McDoyle *v.* McCormick, 121 Fed., 61; Hughes *v.* Livingston, 104 Fed., 306; Paul *v.* D., L. & W. R. Co., 130 Fed., 951).

In Corliss *v.* Pulaski Co., 116 Fed. Rep., 289 (C. C. A., 8 Cr., 1902), the Court made a general finding, and afterwards made special findings. On appeal it was doubted whether the special findings were sufficient to sustain the judgment, but the general finding was deemed to supply the defect.

(3.) In any event a party who has requested that a concise decision should be made and has expressly waived the right to specific findings by the trial Court and who has been heard upon every question of fact upon all the evidence in the Appellate Court seems to have no just ground to complain that the concise form of decision did not afford him "due process of law" because the specific fact ultimately regarded by the Appellate Court as essential to the right of recovery had not been specifically found.

If by adopting the form of a general concise decision the party jeopardized in any respect the success of his ultimate appeal to the Court of Appeals, that was a risk which he took as an offset to the advantage which he proposed to obtain by the general form of decision if the judgment had been in his favor.

(4.) It is unquestionably true that when the judgment was rendered by the General Term, the author-

ity conferred by Section 1022 as amended and then in operation, providing that the General Term "shall review all questions of fact and of law and may either modify or affirm the judgment or order appealed from, award a new trial or grant to either party such judgment as he is entitled to," had been held by the General Term to embrace the authority upon an appeal on a case and exceptions not only to find facts which had not been specifically found in a general concise decision in support of the judgment, but even to go further, and thereupon to reverse the judgment of the court below and to grant final judgment for the appellant. This construction of the statute then prevalent was concededly sufficient to justify the General Term in examining the evidence on the case and exceptions and finding upon the fact of the validity of the releases. And even if subsequently in other cases the Court of Appeals held that the statute had been improperly construed in that it did not confer upon the General Term authority to examine the evidence and find facts upon which to reverse a judgment and render final judgment; and even though these decisions of the Court of Appeals could be regarded as so broad as to affirm that the General Term had no authority to examine the evidence and find facts not specifically found in a concise decision in support of a judgment; still, inasmuch as the judgment when rendered was in accordance with the law of the State as it then existed and as it was then promulgated, this Court will not undertake to say that the judgment so rendered was void for want of due process of law, even though the principle upon which the decision was made was afterwards declared by the Court of Appeals to be erroneous.

Deposit Bank *v.* Frankfort, 191 U. S., 499; Loeb *v.* Columbia Twp. Trustees, 179 U. S., 492, 498.

(5.) But if it were true that the appeals to the General Term and to the Court of Appeals were

both irregular and invalid, no constitutional question would be presented. An appeal is a privilege given and regulated by the statutes of each particular State. It is a mere matter of State legislation. Where a trial has once been had which affords a party due process of law, he cannot complain that he has been deprived of due process of law because no right of appeal is given, or because the appeal which he has been permitted to take did not afford him the redress to which he believes himself entitled, where no benefit which he could derive from the judgment has been diminished on appeal.

McKane *v.* Durston, 153 U. S., 684–687;
Andrews *v.* Swartz, 156 U. S., 272;
Holden *v.* Hardy, 169 U. S., 366.

(5.) It comes to this, that having been heard fully upon the question of fact upon all the evidence submitted by them at the General Term the appellants now complain that the General Term had no jurisdiction to determine that fact, and that the Court of Appeals in denying their motion to send the case back for a new trial because of this alleged want of jurisdiction by the General Term erred, and by this error they were deprived of their property without due process of law. No constitutional question is here presented except merely in words.

The rule has been frequently reiterated in this court that where the parties have been fairly heard in the regular course of judicial proceedings, an erroneous decision by the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States.

Central Land Co. *v.* Laidley, 159 U. S., 103; Walker *v.* Sauvinet, 92 U. S., 90; Head *v.* Amoskeag Mfg. Co., 113 U. S., 9, 26; Morley *v.* L. S. & M. S. R. Co., 146 U. S., 162, 171; Bergemann v. Backer, 157 U. S., 655; Fielden *v.* Ill., 143 U. S., 452.

It is equally well settled that it is not enough that a mere claim in words is made that the appellant has been deprived of due process of law to justify a direct appeal to this Court. It must appear that there is a real and not merely a feigned or fictitious question of the invasion of a constitutional right presented, or the appeal will be dismissed.

New Orleans Water Works Co. *v.* Louisiana, 185 U. S., 336; St. Joseph & G. I. R. R. Co. *v.* Steele, 167 U. S., 659; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S., 239; Lampassas *v.* Bell, 180 U. S., 276.

The appeals, therefore, should be dismissed.

II.

The rights of each of the parties in the estate of Mr. Fayerweather were conclusively determined by the judgment in the Amherst College case.

1. It is an universally recognized rule of law that where a court having jurisdiction of specific property, the subject matter of an action, awards the property to one of the parties to the action, every other party is conclusively bound by such adjudication and cannot thereafter assert any right in the property inconsistent with that judgment, until the judgment has been first vacated or set aside.

The subject matter of the Amherst College action was the residuary estate of Daniel B. Fayerweather and the determination of the conflicting rights of the parties to that estate was the sole object of the action. Each of the three classes of claimants claimed to be entitled to the beneficial interest and equitable ownership of so much of the residuary

estate as exceeded one-half given in charity, and each of them based their claim upon the will of 1884 and codicils. A judgment awarding this interest in the residuary estate to the twenty colleges necessarily determined that neither of the other classes of claimants was entitled to it. These complainants are therefore conclusively bound by that judgment.

When this case was before the Circuit Court of Appeals on the appeal from the injunction order, that Court, after setting out the various steps in the Amherst College case above enumerated, and the judgment finally reached, said (Wallace, *J.*, Fayerweather *v.* Rich, 91 Fed. Rep., 721, 724):

> "By whatever process of reasoning the result was reached, it is plain that by the judgment of the State court it has been determined that the fund now in controversy equitably vested in the various corporations made legatees by the ninth clause of the will and did not, as to any part of it, belong to the complainants; and that determination was reached in an action between the same parties now present, brought to settle the ultimate rights of each to the fund. As the present suit is brought to determine the rights of the same parties to the same fund, we are unable to doubt that the former judgment is an estoppel and a finality, not only as to every matter which was offered and received to sustain or defeat the respective claims of the parties to the fund, but also as to any other admissible matter which might have been offered for that purpose."

The Court in support and illustration of these propositions, cited

> Cromwell *v.* Sac. Co., 94 U. S., 351; Stout *v.* Lye, 103 U. S., 66; Dowell *v.* Appleby, 152 U. S., 327.

Many other cases might be referred to. Among them

> U. S. *v.* Cal. & O. Land Co., 192 U. S., 355; Werlein *v.* New Orleans, 177 U. S., 390; Nougue *v.* Clapp, 101 U. S., 551-555; Bar-

row *v.* Hunton, 99 U. S., 80; United States *v.* Throckmorton, 98 U. S., 61-65; Wilson *v.* Dean, 121 U. S., 525; Manhattan Trust Co. *v.* Trust Co of North America, 107 Fed., 328; Tuska *v.* O'Brien, 68 N. Y., 446; Stillwell *v.* Carpenter, 59 N. Y., 414; Young *v.* Farwell, 165 N. Y., 341; The Mayor *v.* Brady, 115 N. Y., 599.

2. But the complainants deny the binding effect of the judgment because they say Judge Truax decided in favor of the colleges as against the complainants on the ground that the Act of 1860 had no application and that the complainants consequently had no interest in the estate and for that reason he thought it unnecessary to pass upon the validity of the releases, while the appellate courts held that the Act of 1860 did apply and that the complainants had an interest in the residuary estate, which, however, had been extinguished by the releases, which the General Term Judges declared to be valid.

If we assume that Judge Truax gave judgment for the colleges upon an erroneous view of the law, it is none the less true that the judgment was made and that it awarded the fund to the colleges and established their title thereto—since question of the title was the fundamental issue presented by the pleadings and determined by the judgment. That judgment has not been modified or reversed. There are no facts alleged in the pleadings or presented by the proofs to show that it was fraudulently procured. It stands, therefore, as an unimpeached muniment of the title of the colleges to the fund. Indeed it is not only unimpeached, but it has been affirmed and re-established by the judgments of the General Term and of the Court of Appeals. The grounds of decision in the different courts differ, but the judgment has at all times remained the same.

It is too plain for argument, that this Court can-

not disregard the conclusive effect of the State court judgment on the ground that it was given on an erroneous view of the law.

In Milne *v.* Deen, 121 U. S., 525, Mr. Justice Fields in delivering the opinion of the Court said:

> "The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided whether the decision was right or wrong."

It cannot be successfully contended that Federal courts of equity have power to disaffirm or disregard judgments of the State courts by reason of error or irregularity other than want of jurisdiction or fraud.

Barrow *v.* Hunton, 99 U. S., 80.
Graham *v.* R. R. Co., 118 U. S., 161.
Arrowsmith *v.* Gleason, 129 U. S., 99–100.
Marshall *v.* Holmes, 141 U. S., 589–600.
K., Ft. S. & M. R. Co. *v.* Morgan, 21 C. C. A., 468, and note.

But there is no attack on the Amherst College judgment upon either of these grounds.

3. It is equally plain that the cases referred to by the complainants, in which it has been held that a judgment is conclusive upon the parties only as to the actual issue tried, and that competent evidence, including parol proof, may be resorted to for the purpose of identifying the issue so decided, can have no effect on the conclusiveness of the judgment in the Amherst College case, for the reason that there is no question but that the issue before the Court and determined in that action was the

title to the residuary estate. Even if Judge Truax, in determining that issue, did not consider it necessary to make a finding on the validity of the releases, he nevertheless did actually decide the fundamental issue of title. The authorities sustain the rule, that upon a judgment as there given, every fact essential to the support of the judgment must be conclusively presumed to have been found, whether in fact found or not. But irrespective of that rule it is clear that the finality of the judgment as to the title cannot be defeated by showing that the evidence or findings did not support the judgment.

> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached."
>
> Last Chance Mining Co. *v.* Tyler M. Co., 157 U. S., 683.

Even if it were possible to reach the conclusion that the validity of the releases was not determined, the judgment would still be completely effective in disposing of the title to the estate.

4. The judgment is equally conclusive upon the entire estate of Mr. Fayerweather.

We have quoted above from the answer of the widow and next of kin, in which they conceded the right of the colleges to bequests made to them up to the extent of one-half of the estate, less debts and other bequests to charity, and also to the residuary estate to the extent of such one-half (*ante*, p. 10). The final decree confirmed the report of the referee appointed by the interlocutory judgment (Record, Vol. 1, p, 71) and the amount of the residuary estate was ascertained.

The final judgment (Record, Vol. 4, pp. 167-182) directed the payment of the balance of the legacies remaining unpaid and directed the distribution of

the residuary estate among the twenty colleges and the Northwestern University. This final disposition of Mr. Fayerweather's estate, pursuant to the concession of the defendants' answer and its prayer that the ultimate rights of the parties *in the estate of Daniel B. Fayerweather* be determined and enforced, taken with the adjudication as to the residuary estate, judicially disposed of all of Mr. Fayerweather's estate, and the complainants cannot now be heard to say as against these defendants, that the judgment in the Amherst College case was limited to an adjudication as to the residuary estate alone.

III.

The validity of the releases was determined in the State court action.

1. In the State court action, the plaintiffs by pleadings, proofs and arguments at all stages of the litigation claimed title to the residuary estate upon two theories, (1) that the act of 1860 did not apply, (2) that if it did apply, the widow and next of kin could not avail of it because of the releases.

If we assume that Judge Truax decided in favor of the colleges upon the first of these grounds, we must also assume that the General Term and Court of Appeals sustained the judgment upon the second ground, since both of these assumptions are derived from the opinions of the Judges and their evidence.

2. But, the complainants contend that the General Term was without jurisdiction to affirm the judgment upon the ground of the invalidity of the releases, since that was not found by Judge Truax. In this respect they are clearly mistaken.

We refer to the argument already advanced (Point I.) and add the following general observation:

It is true that the General Term and its successor, the Appellate Division, sit as courts of review and

not as trial courts. But the General Term had, and the Appellate Term now has, authority to review all questions of fact and law (Code, Sec. 1022), and it is settled by abundant authority that the General Term might and the Appellate Division and the Court of Appeals may affirm a judgment when upon the record including the evidence it appears that the judgment was right, even though in order to do so, the Appellate Court must examine and determine questions of law or fact which were not passed upon by the Court below.

Ward v. *Hasbrook*, *169 N. Y., 407*, is the last of a long series of cases supporting this proposition. In that case the plaintiff recovered at the Trial Term upon the ground that the defendant was liable on a collateral agreement for the payment of rent which was within the Statute of Frauds and the Appellate Division affirmed the judgment upon that ground. The Court of Appeals were of opinion that the evidence was insufficient to sustain the plaintiff's cause of action upon the theory of a collateral undertaking, but that it was sufficient to sustain a recovery upon the ground of an original undertaking and affirmed the judgment. The Court said:

> "The fact that the judgment of the trial Court was sustained by the Appellate Division on a different theory than that now adopted, offers no obstacle to its affirmance here. We have held that a correct decision will not be reversed on appeal because founded upon a wrong reason; at least, unless where the ground of decision can be seen to have misled a party to his injury (Marvin *v.* N. Y. Life Ins. Co., 85 N. Y., 278)."

In the case of Keegan *v.* Smith, 60 App. Div., 168, where a referee who tried the case *declined to make a particular finding*, the Court said:

> "The rule is settled that the evidence may be referred to to see whether there was sufficient proof to warrant it, although it was not made, and if there is sufficient, the judgment will be sustained, although the findings is not

actually made by the Court (Chubbuck *v.* Vernam, 42 N. Y., 432; Valentine *v.* Conner, 40 N. Y., 248).

But while the Court is at liberty to examine the evidence to see whether there was sufficient proof to sustain the decision, it is not at liberty to examine the evidence to see whether there was testimony to supply a finding to reverse the judgment (*Equitable Co-operative Co.* v. *Hersee, 103 N. Y., 25*)."

The reason for this distinction between an affirmance and reversal of judgments is found in the nature of the review by an appellate court under the New York practice. When the judgment is reversed the respondent should ordinarily be granted a new trial unless the facts are conceded, because upon the record before the appellate court the appellant's exceptions only have been presented and considered, and it may well be that there were at the trial erroneous rulings against the respondent which have not been considered, but which might, if presented, materially affect the conclusion.

Thomas *v.* N. Y. Life Ins. Co., 99 N. Y., 250.

This reason has no application where the judgment is affirmed, if it appears to the appellate court from the whole case that the judgment was correct and if the evidence is before the appellate court.

Where the evidence is before the appellate court it has always been the rule that the Court of Appeals might in support of the judgment examine the evidence and supply findings needed to support the judgment.

Thus, in F. N. Bank *v.* Chalmers (144 N. Y., 432, 436), after observing that no finding was made at Trial Term upon a fact deemed essential, the Court said:

"The fact is involved in the findings, since it is essential to the legal conclusion which cannot stand without it. We may look into the evidence therefore to see whether it

would have sustained such a finding if it had been explicitly made, and thereupon assume the fact in support of the judgment."

The rule thus stated has been uniformly approved.

See cases cited *supra*, foot of page 28.

3. The rule is even more emphatic under the practice permitting the short form of decision than it was and is where specific findings of fact and law are made.

In the latter case, if an appeal is taken merely from the judgment without the presentation of "a case," bringing the evidence before the Appellate Court, the Appellate Court can only consider whether the legal conclusion is correctly drawn from the facts found.

Rochester Lantern Co. *v.* Styles & Parker Press Co., 135 N. Y., 209.

In the case cited the Court (Earl, *J.*) calls attention to the distinction between the instances in which the evidence is before the Appellate Court and those where the case comes up on specific findings without the evidence. It said:

> "The learned counsel for the plaintiff, however, contends that if the findings of fact contained in the record are insufficient to uphold the judgment, then we may assume that there was evidence upon the trial sufficient to justify other findings of facts which would support the conclusions of law. *Such undoubtedly is the rule when upon an appeal a case has been made containing the evidence. Then the appellate court may look beyond the findings of facts into the evidence, and see if there is any evidence to support the conclusions of law, and it may affirm the judgment even if the findings of facts actually made do not support it if it finds sufficient evidence to justify it.* But there is no foundation for this rule when the appeal is upon the judgment roll alone, and the evidence is not before the Court."

Where a concise form of decision is made, the general finding is in the nature of a general verdict and the judgment will be sustained, although the facts stated as the ground of the decision are insufficient to warrant the judgment, even where the evidence is not before the Court.

Matter of Health Dept. *v.* Weeks, 22 App. Div., 110; Gardner *v.* N. Y. Mutual Sav. & Loan Assn., 67 App. Div., 141; Amherst College *v.* Ritch, 151 N. Y., 282; People *v.* Barker, 152 N. Y., 431; Bomeisler *v.* Forster, 154 N. Y., 237.

See cases cited *ante*, p. 34.

And this was also the rule where no findings were made before the amendment.

Viele *v.* R. R. Co., 20 N. Y., 184; Smith *v.* Coe, 29 N. Y., 666.

4. The complainants refer to the cases in which it has been held, that upon reversing a judgment the General Term or Appellate Division ordinarily may not award ultimate judgment in favor of the appellant, but must send the case back for a new trial, and also to those cases in which it has been held that the Appellate Division cannot make new findings upon the evidence upon which to base a reversal.

Benedict *v.* Arnoux, 154 N. Y., 715; New *v.* Village of New Rochelle, 158 N. Y., 41; Van Beuren *v.* Wotherspoon, 164 N. Y., 368.

These cases have no application here. They proceed upon the rule that appellate courts cannot look into the evidence to formulate facts upon which to reverse a judgment, nor can they add new findings as such to the record. But while the General Term and the Appellate Division have no power to add findings as such to the record, yet the rule is firmly established, as appears from the authorities cited

above, that they may affirm the judgment upon facts appearing in the evidence, which are not stated in the findings.

5. It follows as a corollary from what has been stated as to the powers of the General Term and Appellate Division that any additional fact found by them in the evidence in support of a judgment, which they affirm, is as conclusively determined by the judgment as though it had been specifically found in the findings of the Court below, and since in the Amherst College case the issue as to the validity of the releases was open under the pleadings, the judgment concludes that issue.

New Dunderberg Min. Co. *v.* Old, 97 Fed., 150; Werlein *v.* New Orleans, 177 U. S., 390.

We have heretofore referred to the practice previous to the Code and of the United States Courts regarding the examination of evidence and the determination of questions of fact by appellate courts (*ante*, pp. 29-30). It remains only to add that the authority of the General Term to pass upon the validity of the leases in the Amherst College case is conclusively determined by the judgment of the Court of Appeals where the question of the jurisdiction of the Court in this very particular was challenged and affirmed (see *ante*, pp. 19-21).

6. But if the General Term usurped jurisdiction in affirming the judgment upon the facts, what becomes of the judgment at the Special Term? By what authority may that judgment be annulled, since even if it has not been legally affirmed upon appeal, it has never been reversed or set aside?

Moreover, what becomes of the final judgment which disposed of the entire estate of Mr. Fayerweather entered July 6, 1897 (Record, Vol. 4, pp. 167-189), to which these appellants are parties, upon which they were heard, and from which no appeal

has been taken? By what authority can the effect of that judgment as *res adjudicata* be disregarded?

(7.) It is not competent to impeach a judgment by calling judges to the witness stand to testify as to the mental processes by which they reached the conclusion on which the judgment is based. Such a course is contrary to the settled rules of law, and if permitted would inaugurate a most pernicious practice.

The dignified protest "against this method of ascertaining what has been decided by the courts," made by Chief Judge Parker, was founded upon reason.

> "It is a general rule, which has been long and well settled, that the testimony of jurors will not be received to impeach their verdict."
>
> The People *v.* Columbia Common Pleas, 1 Wend., 297.
>
> Sargent *v.* ———, 5 Cowen, 106.
>
> Dana *v.* Tucker, 4 Johns., 487.
>
> Welling *v.* Swasey, 3 Gil. & Johns., 473.

It is apparent that it was not contemplated by the statute that the concise form of decision should state every fact found by the trial Judge, and the law prohibts the General Term from making additional findings of fact. It follows that in every case where a judgment is affirmed upon a concise decision, the validity of the affirmed judgment may be questioned by evidence *dehors* the record.

Trial and appellate judges will be subject to inquisition for the purpose of ascertaining what facts they relied upon in making or affirming a judgment. The validity of judgments will thus be made to depend not upon the records of the Court, but upon the uncertain memory of judges, or the inferences to be drawn from their published opinions. We submit that such a situation would be intolerable.

The stability of judgments would be destroyed. Titles which stand on affirmed judgments would be open to question and attack, and in short, there would cease to be any finality to judgments.

IV.

The procedure in the State court did not deprive the complainants of their property without due process of law.

In support of this proposition we refer to the arguments and the authorities cited under Point I. above.

The cases referred to by the complainants as supporting the right to attack the judgment as not being an adjudication under due process of law when properly read have no application here. They were each of them cases in which the Court either never acquired jurisdiction of the person or lost jurisdiction of the person before the entry of the judgment. Such are the cases of

Hovey *v.* Elliott, 167 U. S., 409; Windsor *v.* McVeigh, 93 U. S., 274, 278; Galpin *v.* Page, 18 Wall., 350; Stuart *v.* Palmer, 74 N. Y., 183; R. R. Tax Cases, 13 Fed. Rep., 722.

V.

The complainants have no interest in the estate of Mr. Fayerweather and cannot maintain the suits.

The releases are a part of the record (Record, Vol. IV., pp. 208, 209, 210-212).

By the terms of the settlement made, including the releases, it was expressly agreed upon the part

of these contestants "that no suit shall hereafter be "brought for the construction of said will and codi- "cils by either of them, or to set aside the will and "codicils of either of them, and we further agree "not to make any claim upon the said Justus L. "Bulkley, Thomas G. Ritch and Henry B. Vaughan. "or either of them or against their heirs or personal "representatives or either against them, the said "Bulkley, Ritch and Vaughan, as executors or as "residuary legatees, other than for the amounts "left to us by the will and codicils aforesaid, and "the deed of gift executed by the said Bulkley, "Ritch and Vaughan, on the 24th of February, "1891, and the instrument dated the 5th of March, "1891."

This was executed by the complainants (Record in the State court, p. 354).

The State court action determined the validity of this release and agreement as between these defendants and the complainants, and the complainants cannot be heard in this action to dispute the effect of that adjudication, or to assert any claim inconsistent therewith.

It follows, therefore, as a necessary legal conclusion that the complainants can base no right of action upon the denial of the fact thus found against them, nor can any action be maintained in support of a claim which the complainants are not at liberty to assert.

VI.

Neither the original nor the cross-bill state a cause of action which is not barred by the judgment in the Amherst College case.

1. We now assume that by the amended original bill and by the cross-bill the complainants under-

take to attack the probate of the will of 1884 and its codicils, and to avoid the agreements and releases which consented to, and were involved in the probate and disposition of the estate under that will and to establish a destroyed codicil, or to establish the will of 1880. They have heretofore argued that this presents a different claim and subject matter from that determined in the Amherst College case, since it extends to the entire estate of Mr. Fayerweather and not merely to the residuary estate, and is based on a title under the will of 1880, or the destroyed codicil, or as in case of intestacy and not upon title under the will of 1884 and its codicils.

But the judgment in the Amherst College case is necessarily a bar to any claim which can be asserted by complainants based upon an attack upon the probate of the will of 1884 and its codicils.

While the will of 1884 and its codicils stand, the complainants cannot assert title, except under that will. To avoid the will they must avoid the probate of the will, and that can be done successfully only by obtaining a finding that the settlement and releases were procured by fraud. Such a finding necessarily lies at the basis of any recovery upon a title by intestacy or on any other will or codicil. The judgment in the Amherst College case having conclusively determined that the releases were not obtained by fraud, that judgment is necessarily a bar to any attack upon the probate of the will of 1884, upon the ground that the releases were fraudulently obtained.

It has been suggested by the complainants on previous arguments that the judgment in the Amherst College case in any event went no further than an adjudication that the complainants had released their interest in the residuary estate; hence that, since the present claim is to their interest in the entire estate, the judgment in the Amherst College case did not constitute a bar to the entire claim now made.

The answer to this is that the complainants having affirmatively attacked the will of 1884 and its codicils and the probate thereof, and having affirmatively attacked the release set up in the Amherst College case, it is not possible for them to recover here, except upon proof that the settlement and the releases were fraudulently procured. The complainants can assert no title other than that based upon the will of 1884 and its codicils, because while the settlement and releases stand as conclusively confirmed, that will must be taken as the only valid will of Mr. Fayerweather disposing of his entire estate.

2. In the Amherst College case, the plaintiffs alleged the due execution of the will of 1884, and the four codicils, and that they were duly admitted to probate by the Surrogate of the County of New York, by a decree adjudging them to have been properly executed, and establishing them as a will of real and personal property, and directing that they be recorded.

The cross complainant here, as well as the complainants, alleged in their answer in that action (Record, Vol. 1, p. 43), that Mr. Fayerweather executed the will of 1884, with the codicils, and the will as executed was made a part of the answer, as were the four codicils. The answer further alleged that the will and codicils were admitted to probate, and that a decree adjudging that the instruments had been properly executed, and admitting the same to probate as a will of real and personal estate, and directing the same to be recorded and letters testamentary issued thereon to the executors, had been entered. They alleged that it was the intention of Mr. Fayerweather to devise the larger part of his estate to charitable corporations, and that he executed his will and codicils for that purpose; that the devise of the residuary estate to Ritch, Bulkley and Vaughan, was procured by undue influence, misrepresentation, coercion and fraud,

and that it was fraudulent and void as against the widow and heirs at law and next of kin; "and upon the death of the said testator the said defendants, Ritch, Bulkley and Vaughan, have been and now are trustees of said residuary estate for said widow and the executors of her will, and for said heirs at law and next of kin, as hereinafter set forth." They distinctly disaffirm, as we have already stated (*ante*, p. 7), any intention to deny or dispute the right of the Colleges named in the Ninth clause of the will to the whole of the estate left to them, so far as it did not exceed half the estate.

The plaintiff alleged and the complainants by formal concession conceded (Record, Vol. 1, p. 43, fols. 85, 86) the execution and probate of the will of 1884 and the codicils and the validity thereof, except only as to the gift of so much of the residuary estate as exceeded one-half of the entire estate, and upon this state of the pleadings the final judgment was entered; and so long as that judgment stands, the complainants and cross-complainant cannot be heard to claim that the will of 1884 and the codicils were not the last will and testament of Mr. Fayerweather.

Bissell *vs.* Spring Valley Township, 124 U. S., 225.
Last Chance Mining Co. *vs.* Tyler Mining Co., 157 U. S., 683.
United States *vs.* Knox County, 122 U. S., 306.
Barber *vs.* Kendall, 158 N. Y., 401.
Nashville Rway. *vs.* United States, 113 U. S., 261.
Pray *vs.* Hegeman, 98 N. Y., 351.

3. The question of the jurisdiction of this Court to entertain an action to set aside the probate of the will of 1884 and its codicils, or to establish a previous will and codicil has been discussed in previous arguments. If the complainants are estopped by the judgment in the Amherst Col-

lege case from attacking the validity of the releases the question of jurisdiction becomes immaterial, because that estoppel would of itself necessitate a dismissal of each of the complaints. If, nevertheless, the question of jurisdiction is examined into, we submit the following considerations:

(*a.*) The United States Circuit Court has no jurisdiction apart from State statute to avoid a will or to set aside the probate thereof on the ground of fraud, mistake or forgery.

Broderick's Will, 21 Wall., 503; Richardson *v.* Green, 61 Fed., 423; Oakley *v.* Taylor, 64 Fed., 245; Copeland *v.* Bruning, 72 Fed., 5.

Where a State court has jurisdiction to entertain such an action the United States Circuit Court has like jurisdiction.

Gaines *v.* Fuentes, 92 U. S., 21; Ellis *v.* Davis, 109 U. S., 485; Williams *v.* Crabb, 117 Fed. R., 193; Wait *v.* Wait, *Ibid.*, 766.

It, therefore, becomes necessary to ascertain whether an action to avoid a will or set aside the probate thereof may be maintained in the courts of the State of New York, and if so, in what manner.

Previous to May 22, 1897, and at the time of the bringing of the Amherst College suit, the law of the State of New York upon this subject was as follows:

By Sections 2647 and 2648 of the Code, a person interested in the estate of a decedent might within one year after the recording of the decree admitting the will to probate, institute proceedings to revoke the probate of a will. By Section 2481, Subdivision 6, of the Code, the Surrogate was given power among other things to open, vacate, modify or set aside, or to enter as of

a former time, a decree or order of his court, or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause.

The Code also contained a section (1866) by which the validity construction and effect of a testamentary disposition of real estate might be determined by action, but it had been held that this section did not refer to the validity of the instrument, but only to its construction and the validity of the disposition under it.

Anderson *v.* Anderson, 112 N. Y., 104–110.

In 1892 Section 2653*a* was added to the Code, but its language was held to authorize only an action to establish the validity of a will and not an action to determine the invalidity of a will.

Lewis *v.* Cook, 150 N. Y., 163.

This section was amended in 1896 by Chapter 943 in reference to the form of a judgment, and in 1897 it was twice amended (Laws of 1897, Chapters 104–701).

The latter amendment superseded the earlier one.

Reid *v.* Curtin, 51 App. Div., 545.

Accordingly, on May 22, 1897, the amendment to Section 2653*a* went into effect, which reads as follows:

"Any person interested as devisee, legatee "or otherwise, in a will or codicil admitted "to probate in this State, as provided by the "Code of Civil Procedure (or any person in- "terested as heir at law, next of kin or other- "wise, in any estate, any portion of which is "disposed of, or affected, by a will or codicil "admitted to probate in this State, as pro- "vided by the Code of Civil Procedure, "within two years prior to the passage of "this act, or any heir at law or next of kin "of the testator making such will), may "cause the validity (or invalidity) of the pro-

"bate thereof to be determined in an action
" in the Supreme Court for the county in
" which such probate was had."

This was the first provision of law in the State of New York which authorized an action in equity to establish the invalidity of a will previously admitted to probate in that State. Before this enactment it had been held that the Supreme Court of the State of New York had no jurisdiction to revoke the probate of a will.

Post *v.* Mason, 91 N. Y., 539; Anderson *v.* Anderson, 112 N. Y., 104–110.

The amendment of May 22, 1897, extended back only to wills admitted to probate within two years previous to that enactment (see language cited above, also the last paragraph of the section).

The original bill was filed June 29, 1897. The will of Mr. Fayerweather was admitted to probate in 1891. The amendatory act of May 22, 1897, therefore, conferred no jurisdiction upon the Supreme Court of the State of New York to entertain an action to determine the invalidity of that will; nor did the Supreme Court apart from that action have any jurisdiction to entertain such an action.

The Surrogate's Court was the only court which had jurisdiction to revoke a will admitted to probate in the State of New York. It is manifest, that Sections 2647–2648 have no application, since they are limited to a proceeding instituted within one year after the probate. The only other provision of law was that contained in Section 2481, Subdivision 6, cited above.

The complainants have heretofore contended that because the Surrogate had power under this subdivision to set aside his decree for fraud, that this Court had concurrent jurisdiction of a bill in equity for the same purpose. We think that it is manifest that that is not the case.

The powers conferred upon the Surrogate by Section 2481 are exclusively such as relate to probate proceedings. The section is entitled "Incidental Powers of the Surrogate." If this court in equity has concurrent jurisdiction with the Surrogate of any of the powers conferred by that section, it must also have concurrent jurisdiction of all the powers conferred, and it is manifest if that be the case, that it has plenary jurisdiction of probate proceedings wherever adverse citizenship exists.

We think that the true test of whether concurrent jurisdiction exists is found in the question whether the proceeding can properly be deemed an action at law or suit in equity, and whether it is capable of removal into this Court. Suppose the complainants had moved before the Surrogate to revoke the decree admitting the will of 1884 to probate could that proceeding have been removed into this Court if diversity of citizenship had appeared?

This question is answered in the negative by the reasoning in *In re Cilley, 58 Fed., 977*, and in *Simmons* v. *Saul, 138 U. S., 439-459-460. See also Ellis* v. *Davis, 109 U. S., 485; Oakley* v. *Taylor, 64 Fed., 245.*

That the action cannot be maintained under the supposed concurrent jurisdiction of this Court arising from the jurisdiction of the State court under Section 2653*a* of the Code, appears from the express provision of that section which authorizes the action only in reference to wills admitted to probate in the State of New York "within two years prior to the passage of this act" and by the concluding paragraph, which reads as follows:

> "The action brought as herein provided
> "shall be commenced within two years after
> "the will or codicil has been admitted to pro-
> "bate."

The limitation of time in this statute is one which goes to the substance of the action; it is a part of

the right sought to be enforced, and therefore it must appear that the action was brought within the time limited, or the Court will have no jurisdiction to entertain it."

The Harrisburg, 119 U. S., 199.

In that case the Court said:

"The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the Admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes and the limitations of the remedy are, therefore, to be treated as limitations of the right."

b. It is even more apparent that the United States Circuit Court has no jurisdiction of an action to establish a will.

Ellis *v.* Davis, 109 U. S., 485; Simmons *v.* Saul, 138 U. S., 439; Wahl. *v.* Franz, 100 Fed., 680, 683, 686; *In re* Cilley, 58 Fed., 977; Cilley *vs.* Patten, 62 Fed., 498; Oakley *v.* Taylor, 64 Fed., 245.

In Kirby *v.* Chicago & N. W. R. Co., 106 Fed. 551, 556, it is said: "Neither by an original action

nor by an attempted removal from the State court can this Court acquire jurisdiction so as to probate a will or appoint an administrator, or in determining the validity of a will primarily to the appointment of an executor or administrator. That is clear."

The probate of a will was in England originally solely within the jurisdiction of the Ecclesiastical Court, and neither courts of law nor courts of equity had anything to do with such a matter. The jurisdiction conferred upon the United States Circuit Court by statute of suits at common law and in equity was intended to embrace the various forms of procedure carried on in the ordinary law and equity courts as distinguished from the ecclesiastical, admiralty and military courts (Opinion of Bradley, *J.*, in Gaines *v.* Fuentes, 92 U. S., 10, 24).

The primary and direct object of the cross-bill is to establish the will of 1880, and to compel distribution of the estate under that will (see Analysis of Cross-bill, p. 3 of this Bill).

This can be effected only by the probate of that will, the appointment of executors thereunder and administration by them.

It is true that the cross-complaint alleges that as to the property covered by the residuary clause of that will, she as widow has an interest because the residuary estate was not devised by the will, the residuary gift to colleges being invalid under the Act of 1880.

The prayer of the cross-bill asks that it be adjudged that by the legal effect of that will the gift to colleges in the residuary clause was in violation of the statute, and to that extent the estate passed to the widow and next of kin, but it also asks that it be adjudged that the legal title to the entire estate passed to the executors of the will of 1880, and that they are entitled to take and hold the same subject to the valid trusts and to the rights of the widow and next of kin.

It is the settled law of this State that the Act of 1860 does not affect the power of the corporations to

take, but confers a personal privilege upon the persons named in the act and those benefited through them, to defeat testamentary gifts to the corporations named in excess of one-half of the estate of which they may at their option avail themselves.

Trustees of Amherst College *vs.* Ritch, 151 N. Y., 282–335.

This decision is binding on this Court.

Henderson *vs.* Griffin, 5 Peters, 151.

Hence any rights which the complainant asserts by the cross-bill in the estate are such only as grow out of the establishment of the will of 1880, although she claims that a portion of that will is invalid.

Plainly it is essential to any recovery on the cross-bill that there should be a finding, first, establishing the will of 1880, and, second, that the gift to the colleges was invalid as against the complainant, because she had invoked in her favor the Act of 1860.

Jurisdiction to establish the will of 1880 is therefore fundamental to the maintenance of the cross-bill.

c. The complainants, while apparently not conceding that the Circuit court is without jurisdiction of an action brought exclusively to establish a will or to set aside a will or its probate, assert that that court has authority to do each of these things as incidental to a cause of action for equitabte relief, and reference is made in support of this contention to a number of cases in which the validity of the probate of a will has been considered in this court, where it was essential to do so to afford to the complainants relief of the character which courts of equity concededly can grant.

But in order to avail themselves of this proposition it is necessary for the complainants to assert that the purpose of the action is to secure relief in

equity against the releases, upon the ground of fraud. We are thus brought back to the inquiry whether the complainants are at liberty to dispute the validity of the releases, and we again reach the conclusion that they cannot do so, because the validity of the releases has been determined in the Amherst College case.

VII.

The charges made by the complainants in the Amherst College case against the validity of the releases.

Ever since the decision of the Amherst College case by the Court of Appeals, the most impassioned and persistent efforts have been made to create the impression that the contestants were in some way or other deprived of their rights by the judgment in that case. We are not to be led into a retrial of that case by such violent assertions, but we think that a proper regard for the character and dignity of the institutions we represent calls for a brief reference to some of these charges.

1. It has been asserted that the amount of the pecuniary consideration received upon the settlement embodied in the releases carries with it the presumption of overreaching and fraud on the part of the trustees. It is said that the trustees secured from the widow and next of kin releases of an unquestioned interest of about $3,000,000 for the sum of $310,000, paid out of their own money.

Whether the amount of the pecuniary consideration indicates imposition and fraud depends upon the motives which may be supposed to have actuated the widow and next of kin.

The evidence in the Amherst College case shows that Mr. Fayerweather, as he accumulated a fortune,

conceived the idea of bestowing his possessions upon his death in the support and maintenance of educational institutions, and particularly of such as were small and struggling with financial embarrassments. He was childless, without any near relatives other than three nieces, two of whom, these appellants, had lived for years apart from him, and in whom he appears to have had no special interest, although he entertained for them a kindly regard.

During the last twelve years of his life he executed a number of testamentary papers each of which inpicated his desire to leave substantially all his property to certain designated educational institutions.

When he executed the will of 1884, his attention having been called to the statutory restrictions of the State of New York upon testamentary gifts to charity, he at the same time signed and left with his will a memorandum addressed to his heirs in which he expressed his trust that they would permit the provisions of his will to be carried into effect.

Upon the probate of this will and its codicils, papers were produced and brought to the attention of the widow and next of kin, indicating in the most emphatic manner the desire of Mr. Fayerweather that his estate should go to the benevolent purposes named. All the evidence bearing upon the character of the gift to the residuary legatees which was produced upon the trial of the Amherst College case was known to the widow and next of kin, or their counsel, before the releases were executed, since it was produced before the Surrogate. Both the widow and next of kin and their legal advisers distinctly understood that the gift of the residuary estate might be invalid under the Act of 1860, since both Mr. Coudert and Mr. Rollins, their counsel, so argued before the Surrogate.

The testator had made provision for his widow and nieces in the will and otherwise. If they had been content with that provision and had permitted

the remainder of the estate to go according to the known wishes of the testator they would have acted only in a natural and proper manner.

When they came to the settlement of the probate proceeding more was before them than mere mercenary considerations. The amount of additional money received was, under the circumstances, no measure of the consideration which moved them to execute the releases. There were more worthy considerations which constrained them to the course they adopted. For the widow, loyalty to the wishes of her deceased husband demanded that she should make the sacrifice, if sacrifice it was. And a proper deference to the request of their relative and benefactor may be deemed to have furnished no inadequate motive for the conduct of the nieces.

No word of complaint as to the sufficiency of the pecuniary settlement agreed upon was uttered by the contestants during the life of the widow.

The learned counsel who in the Court below claimed to find irresistible evidence of fraud in the pecuniary consideration given for the releases, writing as a judge, said:

> "If the correctness of the judgment below turned upon the question who were the parties intended by the testator to be benefitted and what colleges or institutions he intended should receive the residuary fund, I should have little hesitation in reaching the conclusion that they were the twenty colleges named in the ninth clause of the will and that a distribution made under the so-called deed of gift or a devolution of the residue upon his heirs or next of kin would disappoint his expectations in making the codicil." Dissenting opinion, Andrews, *Ch. J.*, 151 N. Y., 252, 347.

That the widow and next of kin did not wish to disappoint the testator's expectations and therefore released their interest in the estate for a consideration which left the substantial part of the residuary estate to go to the twenty colleges, seems to be a

complete answer to the suggestion that evidence of fraud or overreaching practiced upon the widow and next of kin is to be found in the pecuniary consideration.

2. Again, it is claimed that the trustees in procuring the releases were dealing with their fiduciaries and that they were, therefore, bound at their peril to have known that the residuary estate belonged to the widow and next of kin, but if there was a fiduciary relation it grew out of the fact that Ritch, Bulkley and Vaughan acquired title to the estate either as executors or as residuary legatees under the will of 1884 and its codicils. The appellants could not claim under the will of 1884 and against it at the same time. They could not insist that there was a trust relation under the will and hold the executors to the obligation of such a trust while they occupied the position of repudiating the will and attacking it for invalidity, and while they were standing upon their rights as in case of intestacy.

But this was their attitude while they were in the probate court. They were there claiming in direct hostility to the will and codicils, and were, therefore, dealing with the executors "at arms' length."

That expression, when used in the Court of Appeals' opinion, was not an unguarded statement. The attitude of the parties toward each other at the time the settlement was made was carefully considered and fully discussed in the accurate and painstaking opinion which was filed.

It is true, that in the Amherst College controversy the widow and next of kin were claiming under the will of 1884 and its codicils. When the plaintiffs in that action had established the constructive trust it would have been open to the widow and next of kin to have availed themselves of the efforts of the plaintiffs and to have defeated the expectations of the testator, had it not been for the releases which they had executed. Their claim,

however, was, that the executors were trustees for them of the residuary estate, and the Court of Appeals held that that claim was well taken and would have been enforcible except for the releases. Indeed, the argument of the judge who wrote the dissenting opinion was, that the constructive trust attaching to the residuary bequest was testamentary in character, and arose only under the will of Mr. Fayerweather. It is plain, therefore, that the complainants were asserting rights in that case based solely upon Mr. Fayerweather's will. Not so in the Surrogate's Court. There the complainants asserted no right under the will. Hence it follows, that there was no fiduciary relation between the parties at the time the settlement was made, and also that the complainants having set up the will of 1884 and its codicils, and having asserted a claim thereunder in the Amherst College case, and that claim having been sustained, they are now estopped from claiming in hostility to the position taken in that action, and cannot be heard to deny the validity of the will of 1884 and its codicils.

Sullivan *v.* Colby, 71 Fed. R., 460; Davis *v.* Wakelee, 156 U. S., 680.

3. Again, the attempt is made to avoid the force of the fact that the settlement was made by the widow and next of kin acting under the advice of most reputable and distinguished counsel. It is said in the brief of the senior counsel in the court below that it is "incomprehensible how reputable counsel could have advised the settlement in view of the clear legal rights of the widow and next of kin. The counsel evidently acted upon a mistake and were themselves deceived."

This fails to take account of the situation as it was in 1891. At that time the effect of a testamentary gift to individuals upon an extrinsic trust in favor of educational institutions had not been considered by the courts of the State of New York. There were

many decisions of the English courts and of the courts of other States which indicated that such a gift was not within the Act of 1860.

In the prevailing opinion, in the Court of Appeals, the following language was employed:

> "There are authorities which hold that the rights arising from such a secret trust, as we have been discussing, are not testamentary in character because the trust does not act upon the will but on the fund after it reaches the hands of the legatees."
>
> Harris *v.* Horwell, Gilb. Eq. R., 11; Addington *v.* Cann, 3 Atk., 141; Rockwood's Case, Cro. Eliz., 164; Chester *v.* Urwick, 23 Beav., 407; *In re* Boyes, L. R. (26 Ch. Div.), 531; Atty.-General *v.* Cullen, 14 Irish C. L. R., 137; Olliffe *v.* Wells, 130 Mass., 221; Hoge *v.* Hoge, 1 Watts (Pa.), 163; *In re* Keleman, 126 N. Y., 73; Williams *v.* Fitch., 18 N. Y., 546.

Judge Truax, after a careful and exhaustive review of all the authorities, reached the conclusion that the widow and next of kin acquired no legal rights under the Act of 1860. Counsel after diligent study and exhaustive research conscientiously advocated this position. And this conclusion is greatly strengthened by the decision of the United States Circuit Court in the case of Bowdoin College *v.* Merritt, 78 Fed. R., 480.

There was, therefore, in addition to the uncertainty which attends all litigations upon questions of fact, the additional uncertainty as to the conclusion which might finally be reached by the courts of the State of New York upon the legal question involved.

One may easily comprehend in view of these uncertainties and the disappointed expectations of Mr. Fayerweather, which a successful contest would

involve, how reputable and high-minded counsel could have deemed it wise and right for their clients to agree to a settlement which would avoid litigation, carry into effect the testator's wishes and secure to their clients so considerable a sum of money as $310,000.

4. Again, it is claimed that the executors were active in effecting the settlement by means of groundless assertions, threats of interminable litigation while withholding from the widow any means of support and appeals to the fears of the contestants.

Counsel for these defendants hold no brief to justify the conduct of the executors, but an examination of the record in the Amherst College case will show that the evidence is inadequate to justify a finding that the releases were obtained by fraud. The executors owed the widow and next of kin no duty to advise them as to the wisdom of the settlement which they made, or as to their opinion about the validity of the residuary bequest.

The notion that Mrs. Fayerweather was in pecuniary want or distress at any time between the death of her husband on the 15th of November, 1890, and the date of the releases is without support in the evidence. It did appear that during the probate trial Mr. Vaughan said to Miss Joyce, with apparent rudeness, that he would prosecute the litigation as long as there was a dollar left of the Fayerweather money or of his own private fortune. This intemperate speech is not to be justified; but we submit that it is far from furnishing ground to set aside the releases, or to justify the extreme language employed by counsel. Nor can such effect be given to the letter of Mr. Ritch, written to Mr. Beardsley, in which he refers to the prior will of 1880. It is true that the will of 1880 was less favorable to the widow than that of 1884. The form of the residuary devise differed, its legal effect was the same.

We have now referred to all the evidence which was cited below by the senior counsel for complainants as establishing fraud in the releases.

5. There were the following considerations moving the widow and next of kin to the settlement and releases:

(1.) By the settlement they were carrying out the wishes of the testator and retiring from an ungracious and necessarily painful attempt to frustrate his clearly understood and unquestioned purpose.

(2.) They were receiving $310,000 in cash and an increase of Mrs. Fayerweather's annuity from $15,000 to $25,000 a year.

(3.) They were securing these sums as against the possibility of receiving nothing in case (*a*) the executors maintained their contention before the Surrogate that the gift to them was absolute and not impressed with any trust by reason of the indefiniteness of Mr. Fayerweather's communications to them on the subject, or in case (*b*) the Act of 1860 was held not to apply to a secret trust of the kind Mr. Fayerweather had undertaken to create, as Judge Truax subsequently held, and as the authorities cited by the Court of Appeals in their opinion (Record, Vol. 4, pp. 70–112), seemed at the time to indicate was the law.

Under these circumstances, without any misrepresentation or concealment of fact, or duress, or overreaching of any kind, but acting under the advice of most distinguished counsel fully advised of all the facts by long and exhausting inquiry in the Surrogate's Court, the settlement was made; and not only was there no evidence which called for a finding of fraud or undue influence, but there was no evidence which would have sustained such a finding had one been made.

VIII.

The appeal should be dismissed, or, if not, the decree should be affirmed.

ELIHU ROOT,
JAMES L. BISHOP,
Counsel.

WILLIAM FORSE SCOTT and WILLIAM FORD UPSON,
Counsel for Adelbert College of the Western Reserve University.

JAMES L. BISHOP,
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THOMAS H. HUBBARD,
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GEORGE G. REYNOLDS,
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HALEY FISKE,
HENRY STODDARD,
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Clerk.

IN THE 1

Supreme Court of the United States,

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

AGAINST

THOMAS G. RITCH *et. al.*, individually and as Executor, &c., and others.

No. 157.
2

JOHN B. REYNOLDS, as sole Executor of the Last Will and Testament of Lucy Fayerweather, deceased,
Appellant,

AGAINST

THOMAS G RITCH *et. al.*, individually and as Executor, &c., and others.

No. 158.
3

Please take notice that on Monday, the 29th day of February, A. D. 1904, at the opening of court, or as soon thereafter as counsel can be heard, upon

4 the record on file in said court, and upon the hereto annexed affidavit of Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, copies of which affidavit are hereto annexed, a motion will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

JOHN E. PARSONS,
Counsel for Appellees Justus L. Bulkley and Henry B. Vaughan, as Executors, &c.
52 William St.,
New York.

C. N. BOVEE, Jr.,
Counsel for Appellee Thomas
5 G. Ritch, as Executor, &c.,
18 Wall St.,
New York.

To ROGER M. SHERMAN, Esq.,
Counsel for Appellants Emma S. Fayerweather and Mary W. Achter.

To WILLIAM BLAIKIE, Esq.,
Counsel for John B. Reynolds, as Executor of the last will and testament of Lucy Fayerweather, deceased.

To JAMES L. BISHOP,
Counsel for Trustees of Amherst College.

To RUSSELL & HOLMES,
6 Counsel for Trustees of Dartmouth College.

To ROOT, HOWARD WINTHROP & STIMPSON,
Counsel for Trustees of Hamilton College.

To SETH SPRAGUE TERRY,
Counsel for University of Rochester.

To WILLIAM B. PUTNEY,
Counsel for President and Trustees of Williams College.

To BUTLER, NOTMAN, JOLINE & MYNDERSE,
Counsel for President and Trustees of Bowdoin College.

To ADAMS & COMSTOCK,
Counsel for Union Theological Seminary in the City of New York.
To SCOTT & UPSON,
Counsel for Adelbert College of the Western Reserve University.
To REDDING & KIDDLE,
Counsel for The Northwestern University.
To HOPPEN & TALBOT,
Counsel for the Woman's Hospital in the State of New York.
To HOADLEY, LAUTERBACH & JOHNSON,
Counsel for Mt. Sinai Hospital.
To DEFOREST BROS.,
Counsel for the Presbyterian Hospital in the City of New York.
To MARSHALL, MORAN, WILLIAMS & MCVICKAR,
Counsel for St. Luke's Hospital in the City of New York.
To SWAYNE, SWAYNE, MORRIS & FAY,
Counsel for Lafayette College.
To JOHN MCL. NASH,
Counsel for Trustees of Columbia College in the City of New York.
To HALEY FISK, Esq.,
Counsel for Yale College.
To GEORGE G. REYNOLDS, Esq.,
Counsel for Wesleyn University.

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8

9

10 IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 514.

11

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicils of Lucy Fayerweather, deceased,
Appellants,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 515.

Comes now, the appellees, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, individually and as executors of and trustees under the
12 last will and testament of Daniel B. Fayerweather, deceased, and of the codicils thereto by their counsel appearing in that behalf, and move the Court to advance the above causes upon the calendar and set the same down for argument.

JOHN E. PARSONS,
Counsel for Appellees Justus L. Bulkley and Henry B. Vaughan, individually and as Executors, &c.

C. N. BOVEE, Jr.,
Counsel for Appellee Thomas G. Ritch, individually and as Executor, &c.

IN THE SUPREME COURT OF THE UNITED STATES, 13

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 514.

14

JOHN B. REYNOLDS, as sole Executor of the Last Will and Testament of Lucy Fayerweather, deceased,
Appellant,
AGAINST
THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.
No. 515.

Southern District of New York
City and County of New York, ss.:

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN, being each severally sworn, says: He is one of the executors of and trustees named in the last will and codicils of Daniel B. Fayerweather, deceased, who died November 15, 1890, in the City and State of New York, where he resided. He left him surviving his widow, Lucy Fayerweather, and three nieces, Emma S. Fayerweather, Mary W. Achter and Lucy J. Beardsley. 15

He left a last will and testament dated October 6, 1884, a codicil thereto dated the 13th day of December, 1884, a second codicil thereto dated January 7, 1888, a third codicil thereto dated March 19, 1889,

16 and a fourth codicil thereto dated November 15, 1890.

After a contest over the probate of said will and codicils upon objections filed by Lucy Fayerweather, the widow, Lucy J. Beardsley, Mary W. Achter and Emma S. Fayerweather, nieces of said testator and his only heirs-at-law and next of kin, the said will was admitted to probate by a decree of the Surrogate's Court in the City and County of New York on the 25th day of February, 1891, and the codicils were duly admitted to probate by a decree of the Surrogate's Court on the 24th day of March, 1891.

Thereupon the said Ritch, Bulkley and Vaughan
17 duly qualified as executors and entered upon the performance of their duties. The said Daniel B. Fayerweather left an estate of upwards of six millions of dollars.

$2,100,000 was given by the terms of said will and codicils to the following named colleges and for the following amounts:

Bowdoin College	$100,000
Dartmouth College	100,000
Williams College	100,000
Amherst College	100,000
Wesleyan University	100,000
Yale College	300,000
Columbia College	200,000
18 Union Theological Seminary	50,000
Hamilton College	100,000
University of Rochester	100,000
Cornell University	200,000
Lafayette College	50,000
Lincoln University	100,000
University of Virginia	100,000
Hampden University	100,000
Maryville College	100,000
Marietta College	50,000
Adelbert College	50,000
Wabash College	50,000
Park College	50,000

By the terms of the fourth codicil the testator 19
gives his residuary estate, amounting in the neighborhood of three millions of dollars, to the said Ritch, Bulkley and Vaughan.

In June, 1893, an action was begun in the Supreme Court in the State of New York by the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester and the President and Trustees of Williams College against said Ritch, Bulkley and Vaughan, and all the parties who might by any possibility have an interest in the residuary estate of the testator. In that action the plaintiffs sought to have the Court declare a trust in the residuary estate in favor of the twenty 20
colleges named in the will and above specified. In this action John B. Reynolds, as executor of Lucy Fayerweather, the widow of Daniel B. Fayerweather, duly appeared by William Blaikie and Edward C. James, and the plaintiffs herein, Mary W. Achter and Emma S. Fayerweather, duly appeared by the same attorneys and counsel, and through their said counsel claimed the residuary estate. All of the colleges and institutions having or claiming to have an interest in the residuary estate duly appeared. In fact it was sought in a court of equity having jurisdiction of the parties and subject matter to secure a judgment determining the title and ownership to the 21
residuary estate. The cause was tried before Justice Charles H. Truax of the Supreme Court, in the month of January, 1894, and judgment rendered in favor of the plaintiffs in that action and the remainder of the twenty colleges above named and the Northwestern University. Thereafter the said cause was heard upon appeal in the General Term of the Supreme Court, where the judgment was affirmed. Thereafter an appeal was taken to the Court of Appeals of New York by John B. Reynolds, executor of Mrs. Fayerweather, in the cross-bill, and by the plaintiffs in the bill of complaint herein, Fayerweather and Achter, where,

and on March 10th, 1897 by order of the Supreme Court the judgment of the Court of Appeals was made the judgment of the Supreme Court
22 after argument, the judgment was affirmed, and on July 6, 1897, in said action a final judgment was duly entered in the Supreme Court in the State of New York, by which it was decreed in the seventh paragraph of said judgment that the said twenty colleges above enumerated were entitled to the residue of the estate after making certain specific payments specified in said judgment, and directing said Ritch, Bulkley and Vaughan, as executors and trustees, to make distribution pursuant to the terms of that decree. Prior to the entry of that decree, and in ~~May~~ June 1897, ~~after partial distribution had been made,~~ the plaintiffs, Emma S. Fayerweather and Mary W. Achter, who had been parties defend-
23 ant in the said suits of Amherst *vs.* Ritch, and who had appealed to the General Term and Court of Appeals and been heard in all of said courts, filed their bill of complaint herein in the Circuit Court of the United States for the Southern District of New York, in which action they seek to annul the decrees of the Surrogate's Court of the City and County of New York admitting the will and codicils to probate, and also annul the decrees of the Supreme Court of the State of New York, by which the residuary estate of said Daniel B. Fayerweather was awarded to the said twenty colleges above enumerated.

And thereafter and on February , 1899, John
24 B. Reynolds, as sole executor of the last will and testament and codicil of Lucy Fayerweather, deceased, filed the cross-bill, which is printed on page 262, in volume 1, of the transcript of record herein.

To the bill and cross-bill all the twenty colleges above enumerated and the Northwestern University filed special pleas, setting up the judgment of the State Court in the case of Amherst College and others against Ritch *et al.* as a bar.

By decree dated October 10, 1902, upon final hearing in the Circuit Court of the Unites States for the Southern District of New York, said bill and cross-bill were dismissed and the pleas of the defendants sustained. From said

final decree dismissing the bill and cross-bill the said complainants, Emma S. Fayerweather and Mary W. Achter, appealed directly to this Court, and the cross-complainant John B. Reynolds, as executor, etc., also appealed to this Court. The said cases are respectively numbered 514 and 515, upon the calendar of the October Term, 1903, and will not be reached, it is believed, in the regular call, until February or March, 1905. 25

The estate of Daniel B. Fayerweather has been involved in litigation continuously since his will and codicils were propounded for probate in the office of the Surrogate of the City and County of New York, by deponents in 1901. The final distribution and settlement of his estate has been prevented by such litigation. The twenty colleges, or part of them above enumerated, have from time to time requested deponents to make distribution of the residuary estate under the final decree in the Supreme Court of the State of New York in the case of Amherst College and others against Ritch, and have insisted that the terms of that decree should be carried out. On the other hand the complainants Fayerweather and Achter in the bill, and Reynolds, as executor of Lucy Fayerweather, in the cross-bill, insist that the executors shall not make such distribution, or if they do so it would be at their peril. By the terms of the final judgment in Amherst College and others against Ritch, the deponents, as executors of the estate of Daniel B. Fayerweather, are positively directed to make distribution of the residuary estate among the twenty colleges above enumerated. 26 27

In view of these facts deponents respectfully submit that the case is a proper one for this Court to advance said cause upon its calendar and set the same down for an early argument and hearing.

Sworn to before me this 29 day of February 1904.

Notary Public

[M9457]

FILE COPY.

C. G. Burgoyne's Printing Business, 146 & 148 Centre St., N. Y.

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

vs.

THOMAS G. RITCH, ET AL., individually and as Executors, &c., and others.

No. ~~[illegible]~~ 157.

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,

vs.

THOMAS G. RITCH, ET AL., individually and as Executors, &c., and others.

No. ~~845~~ 158.

SOUTHERN DISTRICT OF NEW YORK, ss.:

JOHN E. PARSONS, being duly sworn, says: I have read the affidavit of Mr. Blaikie, sworn to on February 20th, 1904, upon which Mr. Blaikie has given notice of a motion that the printing and serving of a copy of certain records be dispensed with. That affidavit says:

> "Upon November 30th, 1900, John E. Parsons, as Counsel for the defendants Bulkley, Vaughan and others herein, stipulated upon the Record

with Counsel for Complainants and Cross-complainant, (Volume III, pages 4 and 5) that said Record upon appeal to the N. Y. Court of Appeals, — a stipulated copy of which was filed with the Clerk of said Circuit Court, 'may be used upon the final hearing, and upon any appeal herein, without incorporating them in the Record physically,'"

The record referred to is the record showing the proceedings up to the decision of the New York Court of Appeals in the so-called Amherst College suit. The stipulation to which Mr. Blaikie refers, reads thus :

"MR. PARSONS : And so far as the present offer embraces papers which are in print, or papers which are upon the files of *this Court*, we are willing to stipulate that the papers on file be used in their stead, and the printed papers be used in the place of manuscript papers.

"MR. SHERMAN : Each, every and all of them are objected to, for the reasons last stated in full.

"MR. PARSONS: By *this Court we mean the Circuit Court and the Circuit Court of Appeals*, and the papers referred to are papers which are on file either in the direct suit, the cross suit, or upon the special plea of Hamilton College.

"MR. SHERMAN : I consent that the papers referred to may be used upon the final hearing, and upon any appeal *herein*, without incorporating them in the record physically, providing the defendants make like stipulations on their part, reserving all objections as to their competency, materiality and relevancy as evidence.

"MR. PARSONS : We make that consent."

The papers referred to were on file in the United States Circuit Court.

That Court and the Circuit Court of Appeals were familiar with the record and with the proceedings

shown by the record to have taken place in the State Court litigation. For this reason it was unnecessary to print the papers for the final hearing in the Circuit Court or upon any appeal therein. The stipulation says in so many words "By this Court we mean the Circuit Court and the Circuit Court of Appeals."

Of the motion before Judge LACOMBE Mr. Blaikie's affidavit says:

> "Upon July 18th, 1901, Judge LACOMBE ordered upon the stipulation of all the solicitors (see Volume IV., pages 639–641 inclusive), that 'the printed Case on Appeal in the so-called Five-College Case,' (meaning thereby said case of The Trustees of Amherst College *et al.* vs. Ritch *et als*) 'need not be printed at length, either for final hearing, or for return either to the Circuit Court of Appeals, *or to the Supreme Court of the United States;* but that one copy may be used upon final hearing and certified, attested or identified in lieu thereof; and that any parties may print for the record, or the return, so much of the Record in said Five-College case as they may desire, for the convenience of the parties, or the Court.'"

No such stipulation appears (Volume IV., pages 639–641 inclusive) as is stated by Mr. Blaikie. Judge LACOMBE's order does not refer to any such stipulation. On the contrary, it says that the motion upon which his order was made was opposed by Mr. C. N. Bovee and Mr. Simpson, of counsel for the defendants.

The defendants whom I represent and others took no further action with reference to Judge LACOMBE's order, it being the opinion of their counsel that no order of a Circuit Court Judge could modify or change a rule of the Supreme Court of the United States.

The defendants have insisted that the only question presented by the appeal to this Court is that of jurisdiction, as set forth in their special plea. Against the most earnest objection and remonstrance on their part,

the complainants and cross-complainant have offered testimony bearing upon a great many other matters. If those matters are to be discussed, it is necessary that the Court shall have before it and in the usual way the entire record upon which such discussion is to proceed.

JNO. E. PARSONS.

Sworn to before me this 25th day of February, 1904.

ALBERT S. WRIGHT,
Notary Public,
N. Y. Co.

(L. S.)

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States. 1

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executor, &c., and others.

No. 344. 157.

2

JOHN B. REYNOLDS, as sole Executor of the Last Will and Testament of Lucy Fayerweather, deceased,
Appellant,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executor, &c., and others.

No. 345. 158.

3

Affidavit for Appellees on motion of Complainants-Appellants for order to dispense with printing Volumes 5, 6 and 7 of the Record:

Southern District of New York, ss.:

C. N. BOVEE, Jr., being duly sworn, says: I am counsel for the defendant-appellant Thomas G.

4 Ritch, individually and as executor of the will and codicils of Daniel B. Fayerweather, deceased. I have read the affidavit of William Blaikie upon this motion, sworn to February 20, 1904. On page 5 of his affidavit Mr. Blaikie states:

> "Upon July 18, 1901, Judge Lacombe ordered upon the stipulation of all the solicitors (see Volume 4, pages 639–641, inclusive) that the printed case on appeal in the so-called five college case" (meaning thereby said case of the Trustees of Amherst College *et al.* against Ritch *et als.*) "need not be printed at length, either for final hearing or for return either to the Circuit Court of Appeals or to the Supreme Court of the United States."

5 Mr. Blaikie is mistaken in his statement that this order of Judge Lacombe of July 18, 1901, was upon the stipulation or consent of all the solicitors.

The order referred to is printed at page 639 of Volume 4 of the Record, and reads in part as follows:

> "And after hearing Roger M. Sherman, Esq., of counsel for the complainants upon the original bill and of counsel for complainants upon the cross-bill in support of the motion, *and after hearing C. N. Bovee, Jr., and Mr. Stimson, of counsel for the defendants, in opposition.*"

It is not the fact that the order was consented to. The contrary is the fact and the record itself dis-
6 closes the order was opposed by defendants.

On the same page, Mr. Blaikie states:

> "In accordance with said order various extracts from said five college case, have been so printed for the record and returned herein by *various parties hereto*, and in further accordance therewith the Examiner has duly identified said case upon appeal in said five college suit (see Volume 1, p. 2), in the following words, to wit:
>
> "AND, I IDENTIFY said Volume 5, being the case on appeal in the Court of Appeals of the State of New York, entitled the Trustees of

> Amherst College *et al. vs.* Ritch *et als*, from 7
> page 1 to page 1117 inclusive."

This statement in the affidavit of Mr. Blaikie is misleading. Volume 5 being the case on appeal in the Court of Appeals in the State of New York in the case of Trustees of Amherst College *vs.* Ritch is an exhibit introduced in evidence by the defendants. It was a part of the defendants' proofs. It is a part of the return certified to by the Clerk of the United States Circuit Court upon the appeal to this Court.

In Volume 1, page 1, of the record is the certificate of John A. Shields, the Clerk. He says:

> "I hereby certify that the *following vol-* 8
> *umes*, 1, 2, 3, 4, 5, 6 and 7 *contain a true and complete copy and transcript of the record*, assignments of error and all proceedings had in said Court in the case entitled, &c. * * * as the same remain on record and on file in my office."

Then follows a certificate by Mr. Shields, identifying Volumes 5, 6 and 7, made part of the record.

It may be true that the appellees ~~Fayerweather~~ and Fayerweather, Achter and Reynolds have printed from said five college case various extracts. The defendant executors and colleges have not so printed from said case, but have relied upon the fact that that case was an exhibit and a part of the return herein to be used like any 9
other part upon the argument of the appeal.

I beg to call attention to the fact that the order of Judge Lacombe, dated July 18, 1901, and printed in volume 4, page 639, referred to in the affidavit of Mr. Blaikie, does not dispense with the printing of the volume 5, being the record in Amherst *vs.* Ritch, or volume 6, being the probate record in the Surrogates' Court in New York, for the argument of the appeal in this Court. The order provides that they need not be printed for final hearing or for the return to the Circuit Court of Appeals or to the Supreme Court of the United States. The two vol-

10 umes were already printed, and the order had no relation to depriving the individual Judges in this Court of a complete copy of the record upon the argument of the appeal herein in this Court.

The statement of Mr. Blaikie on page 6 of his affidavit, that certain of the defendants have introduced in evidence certain papers, is misleading. As a matter of fact, all of the defendant colleges claiming to be entitled to the residuary estate, and the executors Ritch, Bulkley and Vaughan, introduced in evidence the papers referred to. Mr. Blaikie, on page 6, referred to the brief filed by deponent (Mr. Blaikie) in the New York Court of Appeals. This brief which he
11 refers to is printed on page 443, in volume 7 of the record, and is a brief filed by him as attorney for executors of Lucy Fayerweather, the widow, Mary W. Achter and Emma S. Fayerweather, next of kin of Mr. Fayerweather. It is there entitled: "Brief for widow's executor and for next of kin." This is called attention to only because Mr. Blaikie seems to make a distinction in his affidavit between a brief filed for the complainants and cross-complainants at General Term and in the Court of Appeals, and "the brief" filed by *him* (Mr. Blaikie) in the New York Court of Appeals upon motion to amend the remittitur therein.

Volume 7, which Mr. Blaikie refers to as a book of briefs, is an appendix of defendants' exhibits printed
12 by the defendants, Ritch, Bulkley and Vaughan, executors, &c., for final hearing, and contains various exhibits introduced in evidence by said defendants. The order of Judge Lacombe, dated July 18, 1901, *made no reference to this book.* It is part of the return upon the appeal herein, as shown by the certificate of Mr. Shields on page 1 of the return.

Deponent further says that the above causes came to final hearing before Judge Lacombe upon the pleas and supporting answers of the defendants setting up the judgment of the Supreme Court in

Amherst College *vs.* Ritch as a bar upon the ground 13
that the plaintiffs Fayerweather and Achter in the bill, and Reynolds, as executor of Mrs. Fayerweather, in the cross-bill, were parties, and were bound and concluded by the judgment of the Supreme Court in that case.

Volume 5, being the record in Amherst College *vs.* Ritch, was introduced in evidence by the defendants in support of their pleas. Both bill and cross-bill were dismissed by Judge Lacombe and defendants' pleas sustained upon the ground that the judgment in Amherst *vs.* Ritch was a bar.

Volume 5 (the record in Amherst *vs.* Ritch) is an inseparable part of the return upon the appeal herein, so certified to by Mr. Shields, Clerk of the 14
Circuit Court.

Volume 6, the record of the probate of the will and codicils of Mr. Fayerweather, was introduced in evidence by the complainants. This volume is an inseparable part of the return upon an appeal to this Court, and is so certified to by the Clerk.

Volume 7, contains various exhibits introduced in evidence by the defendant colleges and the executors of Mr. Fayerweather's will in support of their pleas of *res adjudicata*. Among others there are the briefs submitted to the General Term of the Supreme Court in the State of New York upon the appeal by the complainants in this action Emma S. Fayerweather and Mary W. Achter, and by the 15
complainant in the cross-bill John B. Reynolds, as executor of Mrs. Fayerweather, from the judgment of the Special Term of the Supreme Court in the case of Amherst *vs.* Ritch, and also the briefs of the same parties upon the appeal to the Court of Appeals of the State of New York. This volume also contains other exhibits introduced by the defendants in support of their pleas. This volume is certified to by the Clerk and is an inseparable part of the return.

Deponent respectfully submits that the effect of granting the motion of the complainants to dis-

16 pense with the printing of volumes 5, 6 and 7 of the record may be to seriously embarass this Court in the consideration and final determination of the appeals herein. The said volumes are as much a part of the record and return in this court as either of the other four volumes. They are inseparable from the return. They are open to use and reference by counsel for defendants in the preparation of briefs and argument of the appeal, and the necessary effect upon the Court would be to compel the different members of the Court to use but the single copies of the volumes 5, 6 and 7 on file with the Clerk. In the contingency of frequent reference to these volumes it would result in serious incon-
17 venience to the members of the Court.

C. N. BOVEE, Jr.

Sworn to before me this 9th day of March, 1904.

MARY G. POTTER,
Notary Public,
N. Y. Co.

(L. S.)

FILE COPY.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 834. 157.

2

Affidavit in opposition to motion to dispense with the printing of a portion of the record herein.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 845. 158.

3

UNITED STATES CIRCUIT COURT, Southern District of New York, } ss.:

ELIHU ROOT, being duly sworn, says:

The proofs in behalf of Hamilton College, from the printing of which the appellant asks to be re-

4 lieved, were offered in evidence by me. I believe them to be relevant and material. Upon the argument of this appeal it is my purpose to ask the attention of the Court to these proofs, and I respectfully insist that they should be printed in such form as to be available for the use of all the members of the Court and the counsel taking part in the argument.

ELIHU ROOT.

Sworn to before me this
12th day of March, 1904.

HARRY N. WESSEL,
[SEAL.] Notary Public (139),
New York County.

5

6

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 514.

Affidavit in opposition to Motion to dispense with the printing of a portion of the Record herein.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 515.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

HENRY L. STIMSON, being duly sworn, says: I am an attorney and counsellor at law, and am the solicitor for the appellee, The Trustees of Hamilton College, in the above entitled causes.

I.—I have read the affidavit of William Blaikie, verified February 20, 1904, submitted in support of this motion. I wish to correct possible misapprehension which may arise from some of the statements contained therein.

10 On page 4 Mr. Blaikie refers to a stipulation made on November 30, 1900, by Mr. John E. Parsons as to the use of a copy of the record in the so-called Five College action (the action of Amherst College and others against Ritch in the Supreme Court of the State of New York). An inspection of the record in this case will show that Mr. Parsons in making the alleged stipulation was representing the defendants Ritch, Bulkley and Vaughan alone, and was taking testimony on their behalf. He was not representing Hamilton College, and none of the testimony which he was then engaged in taking on behalf of his clients, nor any of the stipulations then made, have ever been adopted by
11 Hamilton College, and the said testimony and the said record then made form no part of the record of the case against Hamilton College (Record, Volume I., p. 642; Record, Volume 4, p. 663).

II.—Mr. Blaikie further states that on July 18, 1901, Judge Lacombe made an order dispensing with the printing of the case on appeal in the so-called Five College case for return either to the Circuit Court of Appeals or to the Supreme Court of the United States "*upon the stipulation of all the solicitors.*"

This is incorrect. The record shows (Vol. IV., p.
12 639) that this order was made by Judge Lacombe "after hearing C. N. Bovee and Mr. Stimson, of counsel for the defendants in opposition." My recollection conforms to the foregoing recital, viz., that I opposed the entry of that order. I have no recollection and I do not believe that I or any one else representing Hamilton College at any time or in any way made any stipulation or in any way consented to dispensing with the printing of the proofs in this cause upon this appeal in the ordinary way provided by the rules of this Court.

III.—It is true that at the taking of the testimony 13
of Hamilton College it was stipulated that a printed copy of the case on appeal of the said Five College action, containing printed copies of the various papers constituting the judgment roll in that action (the originals of which had been actually produced and offered in evidence by Hamilton College), should be filed in the Circuit Court, and that all parties could refer to it with like effect as to the originals of those papers (see Record, Volume III., p. 580).

The purpose of this was self-evident, viz., to save the constant production of the original papers from the office of the Clerk of the County of New York where they are filed, and it had no reference to 14
the prosecution of any appeal.

IV.—It is also true that for the purpose of the final hearing before the Circuit Court the Circuit Judge made an order permitting Hamilton College to submit to said Court one copy of said printed case on appeal in the Five College action and dispensing with the submission to him of any further copies (see Record, Volume III., p. 594).

The difference between what was thus done by Hamilton College and what the appellants now seek to do is manifest. At the final hearing before the Circuit Court, Hamilton College placed in the hands of the single Judge constituting that Court a com- 15
plete printed set of the evidence upon which it relied, including the said case on appeal in the Five College action. The appellants now propose that there shall be furnished to the nine Justices constituting the Supreme Court of the United States but a single copy of this important part of the record composing the proofs of Hamilton College, making it impossible for each Justice to have constantly before him the full record of our proofs.

I cannot concur in such a proposed plan, and do

not think that such a change in the rules of this Court would adequately protect the rights of Hamilton College on this appeal.

HENRY L. STIMSON.

Sworn to before me this 12th day of March, 1904.

HARRY N. WESSEL,
Notary Public (139),
New York County.

[SEAL.]

FILE COPY

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 157.

2

JOHN B. REYNOLDS, as sole Executor of the Last Will and Testament of Lucy Fayerweather, deceased,
Appellant,

AGAINST

THOMAS G. RITCH *et al.*, individually and as Executors, &c., and others.

No. 158.

3

The Trustees of Amherst College, The Union Theological Seminary, The President and Trustees of Bowdoin College, Adelbert College of Western Reserve University, University of Rochester, Lafayette College, Williams College and Dartmouth College and the trustees of Hamilton College

request that the Court grant the petition of Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan to advance these causes, and to set them down for hearing at an early day. To each of these appellees there was awarded by the judgment of the Supreme Court of the State of New York substantially one-twentieth part of the residuary estate of Daniel B. Fayerweather, deceased. On or about the 16th day of September, 1898, the appellants obtained an order in the first of the above entitled suits restraining the executors from making payment to these appellees of any part of the residuary estate under the judgment of the New York Supreme Court. From this order an appeal was taken to the Circuit Court of Appeals, where the order was reversed (91 Federal Rep., 721). Since that time the executors, although having in their possession a very considerable fund distributable under the said judgment, have made no payment whatsoever to any of the distributees under the said judgment, claiming that the pendency of these litigations is a sufficient ground for withholding further payments under the judgment until the determination of these suits.

Dated February 26, 1904.

JAMES L. BISHOP,
Counsel for Trustees of Amherst College and for Union Theological Seminary.

THOS. H. HUBBARD,
Counsel for the President and Trustees of Bowdoin College.

WM. FORD UPSON,
Counsel for Adelbert College of Western Reserve University.

SETH SPRAGUE TERRY,
Counsel for University of Rochester.

FRANCIS B. SWAYNE,
Counsel for Lafayette College.

WILLIAM B. PUTNEY,
Counsel for Williams College.

HORACE RUSSELL,
Counsel for Trustees of Dartmouth College.

Henry L. Stimson
Counsel for Trustees of
Hamilton College

[L7104]

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 16 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

EMMA S. FAYERWEATHER and MARY W. ACHTER, *Appellants*,
vs.
THOMAS G. RITCH ET AL., *Individually and as Executors, &c.*, AND OTHERS.
No. ~~314~~ 157.

JOHN B. REYNOLDS, *as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, Deceased, Appellant*,
vs.
THOMAS G. RITCH ET AL., *Individually and as Executors, &c.*, AND OTHERS.
No. ~~315~~ 158.

CITY OF WASHINGTON, *District of Columbia*, ss:

C. N. Bovee, Jr., being duly sworn, says: I have read the supplemental affidavit of William Blakie sworn to March 15, 1904, and submitted by leave of court on motion to dispense with printing volumes V, VI, and VII.

In view of what Mr. Blakie states on page 3 of his affidavit in respect of the order made by Judge Lacombe, I beg to call the attention of the court again to the precise terms of that order.

That order did not relate to or dispense with the printing of volume V for the purposes of hearing an argument in this court. It had relation solely to the return to be filed in this court in the event of an appeal. There was no occasion

to appeal from the order of Judge Lacombe. He did not assume to make a rule for this court.

With reference to Mr. Blakie's criticism that a large number of the defendants do not join the executors and Hamilton College in opposition to Mr. Blakie's application, I call attention to the fact that Mr. Blakie has stated in his brief that the case of the defendants was practically conducted under the leadership of Mr. Parsons, Mr. Root, and Mr. Bovee, representing the executors and Hamilton College, and that the records made by Hamilton College and the executors, respectively, were adopted by the different colleges, defendants.

The statement in the affidavit that Mr. Bovee drew the examiner's certificate, volume I, page 2, is not correct. I insisted upon certain amendments to the certificate.

I did not state that I should not insist in this court that the records be printed in conformity with the rule and in order to facilitate the justices of the court in the examination of the cause.

I again call the attention of the court to the fact that the three volumes are as much a part of the return as volumes I, II, III, and IV; that volume V, being the record of Amherst against Ritch, lies at the foundation of the defendants' case and the judgment in their favor. The briefs and affidavits filed on behalf of the complainants in the bill and the cross-bill are sufficient in themselves to show how indispensable that record will be in the discussion and consideration of this case.

I respectfully submit that the motion to dispense with the printing of volumes V, VI, and VII should be denied.

C. N. BOVEE, JR.

Sworn to before me this fifteenth day of March, 1904.

JAMES D. MAHER,

[SEAL.] *Notary Public, District of Columbia.*